

1 UNITED STATES BANKRUPTCY COURT  
2 EASTERN DISTRICT OF NEW YORK

3 -----X  
4 In Re: : 10-40156  
5 MARIBELLAX GROUP LTD., : 271 Cadman Plaza East  
6 Debtor. : Brooklyn, New York  
7 -----X May 19, 2010

8 TRANSCRIPT OF MOTION TO DISMISS CASE OR CONVERT CASE  
9 BEFORE THE HONORABLE CARLA E. CRAIG  
10 UNITED STATES BANKRUPTCY JUDGE

11 APPEARANCES:

12 For the Debtor: DANIEL C. MAROTTA, ESQ.  
13 RICHARD M. GABOR, ESQ.  
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14 For Sovereign Bank: JOSEPH L. SCHWARTZ, ESQ.  
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18 For the U.S. Trustee: Office of the United States Trustee  
19 BY: WILLIAM E. CURTIN, ESQ.  
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25  
Proceedings recorded by electronic sound recording, transcript  
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1 (Proceedings began at 3:59 p.m.)

2 THE CLERK: MaribellaX Group.

3 Appearances, please..

4 MR. SCHWARTZ: Good afternoon, Your Honor. Joseph  
5 Schwartz and Kevin Larner, Riker, Danzig, Scherer, Hyland &  
6 Perretti on behalf of Sovereign Bank.

7 MR. CURTIN: Good afternoon, Your Honor. William  
8 Curtin for the United States Trustee.

9 MR. MAROTTA: Good afternoon, Your Honor. Daniel C.  
10 Marotta law firm of Gabor & Marotta LLC for the debtor.

11 MR. GABOR: Richard Gabor also from Gabor & Marotta  
12 representing the debtor. Good afternoon again, Your Honor.

13 THE COURT: Give me one minute.

14 [Pause in proceedings.]

15 THE COURT: Go ahead.

16 MR. SCHWARTZ: Thank you, Your Honor. As Your Honor  
17 is aware there's a number of matters on today's calendar.  
18 Unless Your Honor disagrees, I think that most important of  
19 those matters would be the motion to convert that was filed by  
20 Sovereign. The U.S. Trustee has also filed a motion to convert  
21 and unless Your Honor disagrees I would take that matter  
22 first.

23 THE COURT: Yes, that will be fine.

24 MR. SCHWARTZ: We filed a reply earlier today. I'm  
25 not sure if Your Honor saw that.

1 THE COURT: Yes, I did.

2 MR. SCHWARTZ: Thank you, Your Honor. In our papers  
3 we set forth a number of things and I guess in arguing a  
4 motion to convert the thing that I would stress most is you  
5 have to look at the statute to begin the story, and the  
6 statute here is 1112(b)(1) which essentially says that absent  
7 unusual circumstances specifically identified by the court  
8 that establish that the request to conversion is not in the  
9 best interest of creditors in the estate the court shall  
10 convert the case, yada, yada, yada, unless if the movant  
11 establishes cause. I paraphrase.

12 THE COURT: Yada, yada, yada. Right. What is the --  
13 the question is where -- what is the cause. That's the  
14 question.

15 MR. SCHWARTZ: The question is the cause. And, Your  
16 Honor, then you look at 1112(b)(4) which contains certain  
17 examples of cause and we've identified what we believe are  
18 four or five different examples of cause. The first example  
19 that we identify is gross mismanagement and Your Honor I'm  
20 sure recalls vividly the last couple of hearings we had in  
21 connection with the motion that Sovereign filed to prohibit  
22 the debtor's use of cash collateral and we would submit that  
23 number one, the debtor's filing on January 11<sup>th</sup> and failure to  
24 seek court approval or consent from Sovereign with respect to  
25 use of cash collateral in and of itself is gross mismanagement

1 which constitutes cause but that's not the end of the story  
2 because there's many other examples in this case. The court  
3 pointed out at the last hearing this case was in disarray.  
4 For example, Your Honor, we set forth and Your Honor might  
5 recall that we showed that the debtor has made since the  
6 bankruptcy filing many payments on a post-petition basis of  
7 pre-petition debts.

8           Now, last week I took the Rule 2004 examination of  
9 the debtor's principal, Mr. Kevin Love, and I asked among  
10 other things Mr. Love about those payments and he readily  
11 admitted yes, the debtor made payments of pre-petition  
12 expenses on a post-petition basis and I admit it, maybe I  
13 didn't understand it but we did it and we're not doing it any  
14 more, but there was many payments that were made on account of  
15 pre-petition expenses on a post-petition basis.

16           The debtor during the first three-and-a-half months  
17 or so of the case failed to set up a debtor-in-possession  
18 operating account. When we brought this to the court's  
19 attention the debtor then set up an account a week or two ago  
20 but for the first three-and-a-half months of the case debtor  
21 didn't set up a DIP account.

22           THE COURT: So I should -- you think that I should --  
23 that a case is filed, there are problems, they're rectified  
24 then I should convert the case based upon the problems that  
25 have been rectified?

1 MR. SCHWARTZ: Well, Your Honor, I think that if --

2 THE COURT: If you could point out to me some  
3 problems that haven't been rectified.

4 MR. SCHWARTZ: There are problems that have not been  
5 rectified and I'm giving you examples because there's many  
6 examples of what I view and I submit are examples of gross  
7 mismanagement. Some have been rectified; some haven't. The  
8 issue with regard to the payment of the pre-petition debt on a  
9 post-petition basis has not been rectified. That money has  
10 not come back to the debtor and so that has not and cannot I  
11 submit be rectified.

12 THE COURT: How much of that was paid?

13 MR. SCHWARTZ: Your Honor, I don't recall the exact  
14 amount but it's definitely \$2,000.00 but I believe that we've  
15 given examples in our motion.

16 THE COURT: I'm thinking that maybe this needs to be  
17 set down for an evidentiary hearing.

18 MR. SCHWARTZ: Well, Your Honor, if I can continue  
19 because I think that there's 15 or so different examples of  
20 gross mismanagement and I --

21 THE COURT: Wouldn't you need to put on evidence of  
22 that?

23 MR. SCHWARTZ: Well, Your Honor, the debtor has  
24 essentially admitted in its monthly operating reports and we  
25 had colloquy at the last hearing. The debtor admitted it

1 before the court that he paid pre-petition debts on a post-  
2 petition basis. That's on example.

3 THE COURT: Well, how much? Is it a material amount?

4 MR. SCHWARTZ: It's definitely in the thousands of  
5 dollars, Your Honor, and in a case like this I would submit  
6 that that's material. On Pages 10 and 11 of our initial  
7 moving papers, Your Honor, we've identified at least eight or  
8 nine different examples that we culled from the monthly  
9 operating reports and those are not the only examples because  
10 when I questioned Mr. Love during his Rule 2004 there were  
11 others as well but if you add up those payments I would submit  
12 that it's probably in excess of \$10,000.00. For example,  
13 there's \$7,000.00 payment to an insurance company. That was  
14 made immediately after the bankruptcy filing on account of  
15 pre-petition invoices and there's others.

16 THE COURT: This is to keep the insurance in place on  
17 the property though; right?

18 MR. SCHWARTZ: Well, Your Honor, the insurer  
19 obviously could not terminate insurance. I don't think that  
20 ever became an issue but they couldn't terminate insurance  
21 without getting stay relief. So certainly if the debtor was  
22 faced with the situation of the insurer trying to terminate  
23 insurance it could have come before this court and argued the  
24 doctrine of necessity and argued that it should be allowed to  
25 pay for certain pre-petition expenses but it didn't do that.

1 So we shouldn't assume that that's what was happening.

2 THE COURT: So this is the list that you -- is at  
3 Paragraph 24 of your moving papers?

4 MR. SCHWARTZ: It's actually Paragraph 30, Your  
5 Honor. These are just the examples, Your Honor. This is not  
6 the exclusive list.

7 THE COURT: All right.

8 MR. SCHWARTZ: In addition, Your Honor, and as the  
9 court might recall, the debtor on a post-petition basis for  
10 three-and-a-half months was making checks paid out to cash  
11 which is not only a violation of the U.S. Trustee guidelines  
12 but essentially that's violative of the spirit of the  
13 bankruptcy code and one can argue that that has been rectified  
14 yet the only reason that anything has been rectified, Your  
15 Honor, is because Sovereign came in and asked the court to  
16 prohibit the use of cash collateral. The debtor was  
17 essentially operating the same way he had operated pre-  
18 petition and the debtor was use -- the debtor's principal was  
19 using the debtor as his piggy bank, and I'll get to that in a  
20 minute.

21 THE COURT: All right.

22 MR. SCHWARTZ: So just because --

23 THE COURT: If that stopped and the money has been  
24 paid back, do we still need to dismiss the case based on that?

25 MR. SCHWARTZ: I'm not asking for dismissal --

1           THE COURT: I don't mean to say dismissed. Convert,  
2 because I know that's what the --

3           MR. SCHWARTZ: The answer is the money has not been  
4 paid back and so the answer is I submit that when cause exists  
5 the court has no discretion. It must convert the case unless  
6 there's unusual circumstances which I submit are not present  
7 here.

8           In addition to the payments of cash, Your Honor --

9           THE COURT: So your view would be -- so you're saying  
10 that post -- the gross mismanagement includes any kind of  
11 post-petition diversion of funds for improper purposes and the  
12 fact that you may have done it in the past and not doing it  
13 now doesn't constitute the kinds of unusual circumstances that  
14 would give the court discretion to not convert the case when  
15 that is present, when that factor is present.

16          MR. SCHWARTZ: I submit to the court that if you look  
17 at the code and under Section 1112(b)(2) it specifically says  
18 that where the court determines at the end of the day that  
19 there were -- that there are unusual circumstances the court  
20 identifies them specifically, and this is where the debtor  
21 objects to the motion to convert, which the debtor has done  
22 here, and the debtor would have the burden of establishing  
23 under 1112(b)(2) A and B number one, that there's a reasonable  
24 likelihood that a plan will be confirmed within the time  
25 frames established in Section 1121(e) and 1129(e) of this



1 title where if such sections do not apply within a reasonable  
2 period of time, and, B, the grounds for granting such relief  
3 be [inaudible] an act omission of the debtor other than under  
4 Paragraph 4(a) for which there exists a reasonable  
5 justification for the act or omission and that will be cured  
6 within a reasonable period of time fixed by the court.

7           So I submit to Your Honor, and I've only identified  
8 four or five different examples of gross mismanagement.  
9 There's many more but I submit to the court that, for example,  
10 the debtor cannot rectify the situation with respect to its  
11 payment of pre-petition debts on a post-petition basis and  
12 there's no reasonable justification for that act in any event.  
13 So the debtor can't meet its burden here.

14           THE COURT: Show me -- where's the debtor's outline?  
15 Here it is. It's (B)(2); correct?

16           MR. SCHWARTZ: Yes, (B)(2).

17                           [Pause in proceedings.]

18           THE COURT: This Paragraph 2 is hard to understand.  
19 The relief provided in Paragraph 1 shall not be granted as  
20 relief provided in Paragraph 1 that's conversion shall not be  
21 granted as to unusual circumstances specifically identified to  
22 the court that establish that such relief is not in the best  
23 interest of the creditors and the estate. Conversion shall  
24 not be granted absent unusual circumstances -- okay -- that  
25 establishes -- not in -- if the debtor objects and shows that.

1 It seems like there's an extra not in there.

2 MR. SCHWARTZ: I agree but I think that one can  
3 understand what the intent behind the statute is.

4 THE COURT: Okay. So the debtor has to establish  
5 that there's a reasonable likelihood of a plan. Okay. So you  
6 would argue that neither of the two of A or B apply here.

7 MR. SCHWARTZ: Well, I would argue that the debtor  
8 cannot meet its burden of proof with respect to either A or B.  
9 I think they do apply. I just think the debtor can't meet its  
10 burden of proof.

11 There's other examples of cause as well, Your Honor,  
12 which we haven't gotten to yet but I don't think the debtor  
13 can establish either A or B and it must be both.

14 THE COURT: Okay.

15 MR. SCHWARTZ: May I go on with respect to --

16 THE COURT: Yes, you may. Why don't we continue to  
17 talk about cause?

18 MR. SCHWARTZ: Thank you, Your Honor. I'll continue  
19 with respect to gross mismanagement because I believe that  
20 there's other examples.

21 The debtor, and the court might recall from the last  
22 hearing, that the debtor was paying a lease obligation,  
23 \$6,000.00 a month with respect to what the debtor identified  
24 as the Adamo lease and when I brought this to the court's  
25 attention in connection with the motion to prohibit use of

1 cash collateral the debtor said well, we're not using that  
2 property any more and so we're not going to -- we're going to  
3 stop making that payment and so -- but for the first three,  
4 four months of the case the debtor paid \$6,000.00 a month to  
5 someone named Adamo who I have no idea who that is for  
6 nothing, for no apparent reason when the debtor if he wasn't  
7 using that lease should have simply rejected that lease. So  
8 \$6,000.00 times four, \$24,000.00 went out which apparently  
9 shouldn't have and I guess the debtor is not going to be  
10 making any payments to Mr. or Ms. Adamo any more but  
11 nevertheless I think that that constitutes gross  
12 mismanagement. The debtor is just wasting money for no  
13 reason.

14           During the Rule 2000 [sic] examination of Mr. Love  
15 that I conducted last week I questioned Mr. Love specifically  
16 about certain payments that the debtor made on a post-petition  
17 basis vis-a-vis credit cards, BMW payments, cell phone  
18 payments, and the court might recall that this was the subject  
19 of colloquy at the last hearing. Mr. Love specifically  
20 admitted that the credit card payments were for his personal  
21 credit cards, that the car payment was for his personal BMW  
22 and that the cell phone was his personal cell phone. So those  
23 payments were all for -- which were unusual payments which  
24 shouldn't have been made for Mr. Love's personal obligation.

25           THE COURT: How much did that come to?

1 MR. SCHWARTZ: Your Honor, in our papers we identify  
2 in our motion and I believe that's in Paragraph 24, Your  
3 Honor, there are certain things that we identified which total  
4 \$85,960.00 but some of the payments that I just talked about  
5 which are the personal credit cards and the BMW payments,  
6 Capital One for example, American Express for example, and  
7 they're in the thousands of dollars as Your Honor can see.  
8 That's in addition to payments that Mr. Love took out that  
9 were paid to him directly.

10 Your Honor might also recall that the payments that  
11 were made by the debtor to Maria Love who's the debtor's  
12 principal's daughter were the subject of colloquy at the last  
13 hearing and the debtor represented to the court that Ms. Love  
14 earns \$700.00 per week yet the payments to Ms. Love were well  
15 in excess of \$700.00 per week and in particular, Your Honor,  
16 there was repayment of \$6,100.00 loan to Ms. Love on post-  
17 petition basis. The debtor had no idea what that was for at  
18 the last hearing. That certainly is an improper payment as  
19 well in addition to the excess payments over the \$700.00 that  
20 were made on a weekly basis to Ms. Love.

21 There's also a payment that was identified during  
22 the Rule 2004 examination of Mr. Love to Maria Love's husband.  
23 His name is John Sassino [Ph.], a \$1,000.00 payment, but  
24 nevertheless it's unclear what that payment was for but  
25 another payment to a family member.

1           Then there's a number of payments on a post-petition  
2 basis to an entity called Brite Carting, B-R-I-T-E. This is  
3 an affiliated company that Mr. Love or his brother own and  
4 control. When I asked Kevin Love, the debtor's principal  
5 about this during his 2004 examination, he initially testified  
6 that the payments were for storage costs because Brite Carting  
7 apparently owns property across the street from where the  
8 debtor owns real property and there's a storage facility, a  
9 storage shed, and he said that the debtor was storing assets  
10 in Brite Carting storage shed and so the payments to Brite  
11 Carting were essentially storage for rent type costs.

12           Then when I presented Mr. Love with copies of the  
13 schedules and I asked him well, where are the assets that are  
14 identified that you just talked about, where are they  
15 identified in the schedules, he said well, I don't know what's  
16 stored in Brite Carting's storage shed. Maybe there's no  
17 assets of Maribella, the debtor. So he quickly back tracked  
18 from the previous testimony. The bottom line is the payments  
19 to Brite Carting are unusual and suspect and it's to an  
20 affiliated company.

21           There was a payment to the debtor's accountant, Ike,  
22 Sultan & Spike [Ph.], \$1,000.00, which we talked about at the  
23 last hearing. There are payments to Northfield Bank and  
24 something that's identified as the Berman loan which I guess  
25 Berman is a mortgagee of some type on one or more of the

1 properties.

2 THE COURT: Well, do they have a subordinated -- do  
3 they have a lien -- were they paid out of your client's  
4 collateral --

5 MR. SCHWARTZ: Yes.

6 THE COURT: -- or --

7 MR. SCHWARTZ: Yes. Mr. Berman apparently has a  
8 mortgage that the debtor contends is a mortgage on one of the  
9 Sovereign financed properties which is subordinated to  
10 Sovereign and Mr. Berman has been getting payments throughout  
11 time during the normal course every month.

12 THE COURT: While your client wasn't being paid?

13 MR. SCHWARTZ: While my client has not been getting  
14 paid, exactly, Your Honor.

15 Then, Your Honor, Your Honor might recall that  
16 pursuant to the court's April, I think it's 15<sup>th</sup> order  
17 respecting cash collateral, the debtor was required to give  
18 weekly flash reports to Sovereign. The flash report that we  
19 received last week indicated that the debtor had received  
20 \$38,500.00 and when I questioned the debtor's principal at the  
21 Rule 2004 examination about that \$38,500.00 he essentially  
22 said that it was a loan. When I questioned him further the  
23 loan apparently came from one of the debtor's tenant's  
24 principals and Mr. Love said to me during his deposition that  
25 that was a friend of his and the loan he said was not a loan

1 to the debtor but instead it was a loan to Mr. Love and Mr.  
2 Love then made a loan to the debtor for \$38,500.00. Your  
3 Honor, I've asked for the loan documents that reflect that  
4 loan. I haven't received them but I could certainly remind  
5 the court about Section 363 and 364 and the debtor's required  
6 when it uses property, when it borrows funds it needs court  
7 approval to do so and the debtor did not come before this  
8 court seeking approval for \$38,000.00 loan.

9           So, Your Honor, those are examples of gross  
10 mismanagement and I submit to the court that they cannot be  
11 rectified, many of them, certain of them perhaps could be but  
12 others can't be. When I questioned Mr. Love, and I'm  
13 representing this to the court, many of the questions I asked  
14 him he conveniently could not answer my questions and instead  
15 his answers were I don't recall, I have to check with the  
16 accountants, and that was -- he answered my questions time and  
17 time again with that type of answer yet when I asked him other  
18 questions that he certainly thought would help him he knew the  
19 answer and he knew the dates and times and things like that.  
20 So I would submit that he was not -- he's not credible but I'm  
21 not asking the court to have an evidentiary hearing to that  
22 effect because I think that, Your Honor, the gross  
23 mismanagement of the debtor and the incredibility of Mr. Love  
24 specifically in the monthly operating reports and his  
25 declaration he filed with the court in connection with use of

1 cash collateral in and of itself constitutes cause via gross  
2 mismanagement under 1112(b).

3           Your Honor, that's not the end of the story with  
4 respect to cause though. Section 1112(b)(4) identifies other  
5 examples of cause and another example of cause is where the  
6 debtor fails to get court approval or consent for its use of  
7 cash collateral and that use of cash collateral that's  
8 unauthorized is substantially harmful to one or more  
9 creditors. I certainly would submit to the court that that  
10 applies here as well.

11           Now, the court might ask me well, at the last  
12 hearing the court allowed the debtor's use of cash collateral  
13 and said well, on a retroactive basis the court is going to  
14 require the debtor to make adequate protection payments to  
15 Sovereign. And the court came up with the number of  
16 \$19,000.00 Your Honor might recall. Well, Your Honor, the  
17 debtor filed on January 11<sup>th</sup>. The court said that the debtor  
18 would need to pay Sovereign \$19,000.00 for the month of  
19 February and May -- and March by the end of May and would have  
20 to pay Sovereign April during April which the debtor did. The  
21 debtor did make that one payment and also have to pay May in  
22 May. So we were now -- I forget today's date, May 19<sup>th</sup> or 20<sup>th</sup>,  
23 and we have not received anything other than \$19,000.00  
24 payment. I would also submit to the court that the debtor  
25 used our cash collateral improperly without court authority or



1 consent during January. We've never identified that. So I  
2 would submit to the court that even if \$19,000.00 were the  
3 correct figure, and I'll -- for purposes of discussion I will  
4 say to the court that let's say that's correct, \$19,000.00 is  
5 the correct figure, \$19,000.00 times five, Your Honor, because  
6 we're now in May is \$95,000.00. Sovereign has received thus  
7 far to date \$19,000.00. So I would submit to the court that  
8 the debtor has used cash collateral paying Sovereign  
9 \$19,000.00. That's certainly in my view, Your Honor, is  
10 harmful to Sovereign and certainly the debtor did not observe  
11 its obligations under the code in using cash collateral  
12 without a court order, without Sovereign's consent.

13 In addition, Your Honor, another example of cause is  
14 that there is substantial continuing losses to or diminution  
15 of the estate in the absence of a reasonable likelihood of  
16 rehabilitation. Now, Your Honor, I really -- although I'm  
17 bringing this issue up I could see Your Honor saying well,  
18 don't we have to have an evidentiary hearing --

19 THE COURT: Are the losses reflected on the operating  
20 reports? Is that what you're telling me?

21 MR. SCHWARTZ: They are, Your Honor, but the  
22 operating reports are very confusing and I'll tell the court  
23 why. The operating reports do show a loss. There's no  
24 question the operating reports show a loss since the case was  
25 filed but I would submit that the operating reports are very

1 misleading because I think that the losses are much larger  
2 than what is reflected in the operating reports.

3 THE COURT: That you're going to have to get into an  
4 evidentiary hearing for that I should think.

5 MR. SCHWARTZ: I would tend to agree with Your Honor  
6 on that subject but the operating reports as filed show a  
7 loss, show a continuing loss and show a diminution of estate  
8 value.

9 THE COURT: How much of a loss?

10 MR. SCHWARTZ: Our papers -- in our papers, Your  
11 Honor, we say that it's \$7,500.00.

12 THE COURT: Per month or altogether?

13 MR. SCHWARTZ: An operating loss of \$85,875.00.

14 THE COURT: Since the beginning of the case?

15 MR. SCHWARTZ: Since the petition date and a negative  
16 cash flow of \$7,800.00. That's what the operating reports  
17 show.

18 THE COURT: Okay.

19 MR. SCHWARTZ: So in and of itself the operating  
20 reports on their face I think prove my case for cause without  
21 even getting into the issue --

22 THE COURT: This is a loss that occurred every month?

23 MR. SCHWARTZ: Well, the \$85,000.00 is cumulative  
24 total.

25 THE COURT: Cumulative but was there also a loss

1 every month?

2 MR. SCHWARTZ: Yes.

3 THE COURT: Okay.

4 MR. SCHWARTZ: Yes.

5 Your Honor, the debtor's monthly operating reports  
6 do not reflect the debtor's obligation to pay Sovereign  
7 adequate protection, do not reflect the debtor's obligation to  
8 pay administrative costs associated with professional fees and  
9 things like that. So that operating loss I'm referring to the  
10 \$85,000.00 does not even take into account the \$95,000.00 that  
11 I just identified as well as whatever administrative costs  
12 that are associated with professional fees in connection with  
13 this case.

14 So, Your Honor, without even getting to an  
15 evidentiary hearing or the concept of an evidentiary hearing I  
16 submit that the operating reports show that cause exists to  
17 convert the debtor's case.

18 Finally, Your Honor, we've identified the last  
19 indicia of cause and that's under 1112(b)(4), the debtor's  
20 failure -- there's actually two. The debtor's failure to  
21 comply with an order of the court. The court entered an order  
22 on April 15<sup>th</sup> requiring the debtor to, among other things,  
23 serve Sovereign with an accounting by April 20<sup>th</sup>. The debtor,  
24 if the court might recall, provided a very incomplete  
25 accounting which only identified \$25,000.00 or so of payments

1 notwithstanding the fact that the court had directed the  
2 debtor to file a complete accounting. So the debtor didn't  
3 comply with the court order plus, Your Honor, the debtor  
4 failed to comply with its obligation to provide information to  
5 the U.S. Trustee and that resulted in the U.S. Trustee's  
6 filing of its own motion to convert this case.

7           So, Your Honor, those are six or so different  
8 examples of cause that are enumerated under Section  
9 1112(b)(4). I would submit that a couple of those are  
10 certainly stronger than others. Certainly the gross  
11 mismanagement, the unauthorized use of cash collateral, the  
12 continuing loss, those I think, Your Honor, are clear on its  
13 face and I don't think that the debtor has any response to  
14 that and I don't think that there's any unusual circumstances  
15 here which would allow the court to institute its discretion  
16 in allowing the debtor to continue operate as a debtor-in-  
17 possession.

18           THE COURT: Do you want to address the reasonable  
19 likelihood of a plan being confirmed?

20           MR. SCHWARTZ: Yes, Your Honor.

21           THE COURT: You've seen the debtor's plan I assume.

22           MR. SCHWARTZ: I did, Your Honor. The debtor filed a  
23 plan last week and essentially on its face it looks to me like  
24 this was a form plan that the debtor took from some other case  
25 because the plan on its face doesn't provide for any treatment

1 at all to any creditors. It's just a form plan with  
2 definitions and different sections.

3 THE COURT: Well, it provides -- your client as  
4 unsecured -- as unimpaired --

5 MR. SCHWARTZ: Well, that's the disclosure statement.

6 THE COURT: -- which I found to be incomprehensible  
7 unless they have the funds to cure the arrears and reinstate  
8 the loan.

9 MR. SCHWARTZ: Yes, Your Honor. What I was going to  
10 say is that the plan in and of itself doesn't even talk about  
11 the treatment of Sovereign. You have to look to the  
12 disclosure statement for that. So the plan would obviously  
13 have to be --

14 THE COURT: You're lumped in with other secured  
15 creditors who are all going to be treated as unimpaired.

16 MR. SCHWARTZ: Correct, Your Honor. Essentially --

17 THE COURT: So what are the arrears on the Sovereign  
18 loan?

19 MR. SCHWARTZ: Well, the debtor hasn't made any  
20 normal monthly payments to Sovereign since -- I believe the  
21 date was April of 2008.

22 THE COURT: Well, there's an argument about that but  
23 what's -- according to Sovereign what are the arrears?

24 MR. SCHWARTZ: I'm just going from memory, Your  
25 Honor, because I don't know the total amount but I know that

1 the payments that were required under the loan documents were  
2 approximately \$2,700.00 per month.

3 THE COURT: 27?

4 MR. SCHWARTZ: \$27,000.00 per month.

5 THE COURT: Thousand per month.

6 MR. SCHWARTZ: \$27,000.00 per month. Since I  
7 believe it's April of 2008 the debtor has not made its normal  
8 monthly \$27,000.00 payment to Sovereign. The debtor is also  
9 behind in payment of real estate taxes which would have been  
10 paid to Sovereign as part of that \$27,000.00 pursuant to an  
11 escrow and so if Your Honor does the math \$27,000.00 times  
12 let's say about almost two years I guess that is what the  
13 arrearage would be --

14 THE COURT: That's about -- that's a little under  
15 \$700,000.00.

16 MR. SCHWARTZ: If that's what the figure is that's  
17 what it is, Your Honor. Your Honor might recall that we  
18 attached to our papers that Sovereign as a result of the  
19 debtor's defaults had accelerated and ultimately filed a  
20 lawsuit pre-petition and so Sovereign asserts that it is owed  
21 in excess of \$3.5 million. When including the fees and costs  
22 and things like that it's probably closer to \$4 million. So,  
23 again, I'm not sure exactly what the arrearage number is but  
24 assuming that Your Honor's math is correct and it's close to  
25 \$700,000.00 that would be the figure.

1           So, Your Honor, obviously the debtor's statement and  
2 its disclosure statement to Sovereign is not impaired as Your  
3 Honor pointed out is ludicrous and so that would be a subject  
4 of litigation in connection with the loan.

5           Your Honor, essentially when you look at the  
6 debtor's plan the debtor again as Your Honor pointed out  
7 lumped together various secured creditors. There's Mr.  
8 Berman. There's Northfield and there's an entity called  
9 Albarra [Ph.] as well as Sovereign. So you have four alleged  
10 secured creditors and what the debtor does is it proposes to  
11 pay Mr. Berman and Northfield exactly the monthly payment that  
12 it was paying to them on an ongoing basis pre-petition and on  
13 an ongoing basis post-petition because the debtor apparently  
14 has never defaulted under either of those loans and the debtor  
15 continues to just make those payments and neither Mr. Berman  
16 nor Northfield never objected or raised an issue because  
17 they've never had a payment default. So they would be I guess  
18 unimpaired.

19           Then you have Albarra who the debtor says is owed  
20 somewhere in excess of \$1 million. The property, the debtor  
21 contends, is worth like 350. So the debtor proposes to give  
22 up Araback [Ph.] its property and then walk away and the  
23 deficiency claim would essentially be waived. I'm not sure  
24 what Araback's position is on that one but I would assume that  
25 unless Araback is a friend of Mr. Love which according to his

1 deposition or his Rule 2004 examination testimony he's got a  
2 lot of friends who seem to work with him and I assume it's  
3 because there's a lot of cash going back and forth here but  
4 that's speculation on my part, Your Honor.

5           Then you have unsecured creditors and there's barely  
6 any and that is in particular set forth in the debtor -- in an  
7 attachment to the debtor's plan. There's only a few. There's  
8 only like four or five unsecured creditors. So at the end of  
9 the day, Your Honor, and those unsecured creditors total  
10 \$125,000.00. One of them is \$100,000.00 owed to a  
11 gentleman -- the last name, Your Honor, according to the list  
12 that's attached to the debtor's plan, his -- Mr. Salamon  
13 [Ph.], Richard Salamon, and Mr. Love testified during his 2004  
14 examination that Mr. Salamon is a good friend of Mr. Love and  
15 apparently made a loan.

16           So you have five or so unsecured creditors. You  
17 have four secured creditors and it looks like everybody is  
18 working with the debtor and everybody is happy except for  
19 Sovereign. So when you take a step back and you look at what  
20 happened in connection with this case, Your Honor, it's very  
21 apparent that the debtor filed its Chapter 11 petition as a  
22 result of the two party dispute with Sovereign because it was  
23 unhappy with the state court's judgment and there's a plethora  
24 of case law, Your Honor, which talks about a bad faith filing,  
25 which talks about when there's a two party dispute. That's



1 not proper bankruptcy -- that's not a proper reason to file  
2 bankruptcy, and I submit to Your Honor that that also  
3 constitutes cause of the conversion of this case to a Chapter  
4 7.

5 So, Your Honor, Your Honor asked me the question  
6 about the debtor's plan. I submit that the plan would be  
7 heavily contested. I submit that the plan cannot be confirmed  
8 over Sovereign's consent and more importantly --

9 THE COURT: Well, you can't be concerned as drafted.  
10 It can't be confirmed because the treatment of Sovereign --  
11 the idea that they're going to be able to cure and reinstate  
12 your loan is not -- is ludicrous. They can't even pay the  
13 adequate protection payments apparently.

14 MR. SCHWARTZ: Exactly, Your Honor. So I submit the  
15 plan is unconfirmable on its face as a matter of law. So  
16 again, Your Honor, the debtor cannot meet its burden even if  
17 we were ever to get to the issue of whether the debt --  
18 whether unusual circumstances are present. The debtor can  
19 never even get to its burden under 1112(b)(2).

20 In addition, Your Honor, the debtor attaches to its  
21 plan projections. What's interesting with respect to those  
22 projections, Your Honor, is that -- and this is -- I don't  
23 know if Your Honor got a chance to take a look at those  
24 projections but those projections on its face, Your Honor, are  
25 totally inconsistent with the debtor's monthly operating

1 reports. I don't know if Your Honor has that -- I'm sorry. I  
2 don't know if Your Honor has those projections in front of  
3 you.

4 THE COURT: They're attached to the disclosure  
5 statements?

6 MR. SCHWARTZ: They're attached to the -- yes, the  
7 disclosure statements and it's actually the second to last  
8 page.

9 THE COURT: Second to last page of the named  
10 documents or of the --

11 MR. SCHWARTZ: You have the disclosure statement and  
12 you have attachments and it's the second to last page of the  
13 attachments to the disclosure statement.

14 THE COURT: Okay.

15 MR. SCHWARTZ: Your Honor, first of all, the debtor  
16 has a protection and anticipates that it will have a steady  
17 rental income stream of \$81,000.00 a month starting in May of  
18 2010. Your Honor might recall that Mr. Love filed a  
19 declaration with this court on April 20<sup>th</sup> in response to  
20 Sovereign's motion to use of cash collateral and in that  
21 declaration or attached to that declaration Mr. Love set forth  
22 what the debtor's anticipated rent would be for the months of  
23 February, March and April of 2010 and then set forth what the  
24 actual rent roll was for February and for March of 2010. The  
25 total rents for those months is approximately \$60,000.00 each

1 month. So I'm not sure where the debtor is getting \$81,000.00  
2 when the declaration that was just filed with this court less  
3 than a month ago says for the first few months of the case the  
4 debtor was receiving a total of \$60,000.00 in rental revenue.

5           Then you go down to the line items below, expenses.  
6 The debtor has obviously in its projections underestimated its  
7 expenses because if Your Honor looks down at the column under  
8 rental expenses that says outside services. I'm not sure  
9 exactly what that means but the -- it's a steady number of  
10 \$6,800.00 per month. I assume what that is is debtor's  
11 principal salary, Maria Love's salary, things like that  
12 because it's nowhere else in this -- in the expense items.  
13 But if Your Honor would look back at the monthly operating  
14 reports for February and March the debtor also has line items  
15 for outside services under the expense column and the debtor's  
16 average for outside service expenses are \$16,000.00 per month.  
17 So how do we get from \$16,000.00 over the last couple of  
18 months to \$6,800.00 on a projected going forward basis. The  
19 numbers just appear very inconsistent.

20           Going down even further under rental expenses, Your  
21 Honor, the debtor has in its projections attached to its  
22 disclosure statement a line item called repairs and  
23 maintenance and the debtor anticipates that it will have  
24 \$500.00 per month of rent -- of repairs and maintenance  
25 expenses. Well, Your Honor, in the month of February of this

1 year on a post-petition basis the debtor filed a monthly  
2 operating report which showed that it had repairs and  
3 maintenance costs of \$11,000.00 per month. So obviously the  
4 numbers appear to be extremely inconsistent with one another.

5           These are just examples, Your Honor, and I haven't  
6 probed these expenses at all. Mr. Love started his Rule 2004  
7 examination. We never even got to this because he came late  
8 in the day. The debtor's counsel wasn't available until later  
9 in the day so we adjourned into a further date. But on its  
10 face, Your Honor, these projections appear to be unreasonable  
11 and they're not something that the court at a -- that the  
12 debtor would not be able to confirm a plan based upon these  
13 projections.

14           What these projections also show, Your Honor, is  
15 that during the first two months of the case the debtor  
16 obviously increased its expenses so that it would have a  
17 reason why it didn't have to pay Sovereign anything.  
18 Obviously it was making all these improper payments for post-  
19 petition -- for pre-petition expenses and payments to Mr. Love  
20 and Mr. Love's credit cards, et cetera, et cetera.

21           So, Your Honor, with all that having been said, I  
22 submit to the court that there is a substantial basis, there's  
23 a very substantial basis for converting this case to a Chapter  
24 7 because cause without question I submit exists. Your Honor,  
25 the case law is clear that where there are numerous improper

1 transfers by a debtor that the court should look very  
2 suspiciously at those transfers because if the court doesn't  
3 convert the case then those transfers might never be  
4 investigated and returned to the estate. And I submit to the  
5 court that I haven't even brought up Mr. Love's testimony  
6 concerning pre-petition payments made by the debtor because  
7 I'm focusing on post-petition but I submit to the court that  
8 there is numerous, numerous pre-petition improper transfers.  
9 In fact, one of the debtor's bank account statements, and the  
10 debtor had more than one bank account, showed that the debtor  
11 spent I believe it was in excess of \$140,000.00 in less than a  
12 year and that money disappeared and we don't even know where  
13 that went. There was numerous payments to Mr. Love, et  
14 cetera, and so, Your Honor I would -- and all the while  
15 Sovereign was receiving nothing, Your Honor.

16 So I would submit to Your Honor that to not convert  
17 this case would allow the debtor to possibly move forward and  
18 those improper transfers to never be investigated which I  
19 submit to Your Honor is improper. Thank you, Your Honor.

20 MR. MAROTTA: Good afternoon, Your Honor. Counsel  
21 really brings up except with this -- except with respect to  
22 discussion of the plan issues in support of his burden to show  
23 cause that had already been raised at the last appearance and  
24 that Your Honor addressed and that the debtor has corrected.  
25 Since --

1           THE COURT: Wait. You corrected all of the problems  
2 identified in the motion, every single one?

3           MR. MAROTTA: Yes, Your Honor.

4           And if I could also bring the court up to date on  
5 all of the efforts that the debtor has made. I outlined some  
6 of them in our motion papers but yes, the Adamo lease has been  
7 rejected. The Adamo lease --

8           THE COURT: Are you going to get back the money you  
9 paid post-petition from them? Wasn't that gross mismanagement  
10 to pay them post-petition rent on a lease that was -- that you  
11 were -- for property that wasn't being used and that you were  
12 going to reject?

13          MR. MAROTTA: Well, no, Your Honor. The reason that  
14 the lease existed in the first place was that it's adjacent to  
15 one of the debtor's properties. It was being renovated and it  
16 was renovated and the bankruptcy interceded. So the debtor  
17 has decided that it can't continue to pay that lease and  
18 continue to develop that property.

19          THE COURT: Why did they pay -- how many months,  
20 three months of post-petition rent on this property?

21          MR. MAROTTA: I don't know if it was three or if it  
22 was two but --

23          THE COURT: Why did they pay post-petition rent on  
24 this property if it was a property that they didn't need to  
25 use? Isn't that gross mismanagement?

1           MR. MAROTTA: Well, they had an option to purchase  
2 the property. They could have developed the property and then  
3 sold it as an asset of the estate but it was not feasible to  
4 do so but it wasn't gross mismanagement.

5           THE COURT: Well, particularly since the bankruptcy  
6 code provides that rent under leases has to be paid during --  
7 currently within the first sixty days. So you would  
8 essentially have sixty days to make that determination but you  
9 didn't. You paid the rent and now you've decided to reject  
10 the lease and so that's money that could have gone to pay  
11 other obligations and is out the door. Why is that not gross  
12 mismanagement?

13           MR. MAROTTA: Well, the debtor did it while it could  
14 to meet with the creditor before terminating the lease also  
15 and we did have a sit down meeting with that creditor and his  
16 attorney in an attempt to try to minimize the damages that  
17 that creditor would seek against the DIP. I'm not sure how  
18 successful we were but we did have a meaningful conversation  
19 with counsel and --

20           THE COURT: But you're not answering my question.

21           MR. MAROTTA: But that's why the debtor continued to  
22 make a couple of lease payments after -- post-petition because  
23 that meeting had not taken place. The decision that -- for  
24 example, we requested that the -- at that meeting we requested  
25 the creditor waive rent for a period of time. In that scenario

1 we would have presented to the court a new proposed lease with  
2 that creditor where we did have the opportunity to develop --  
3 to finish the build out of the property and perhaps sell it  
4 off as an asset but he absolutely refused to entertain that  
5 notion and we had reason to believe that he might.

6 THE COURT: Particularly since he's been getting  
7 rent. So why would he agree not to take rent?

8 MR. MAROTTA: Well, he has also been paid for quite  
9 some time on that property and improvements have been made.  
10 We thought that he would deal with us in good faith and we did  
11 have like I said a meaningful meeting but it did not come to  
12 fruition.

13 THE COURT: Let's go back to the statute. You would  
14 have to show -- assuming that I -- that it is -- that I  
15 conclude that there has been gross mismanagement in paying the  
16 principals and American Express bill and making payments to  
17 cash to the tune of \$16,000.00 during the course of the case  
18 to the various other payments that have been made to insiders  
19 during the course of this case. Assuming that I determine  
20 that that is gross mismanagement then in order to prevent the  
21 case from being converted because it's mandatory, the  
22 conversion is mandatory at that point. You'd have to show  
23 that number one, circumstances, unusual circumstances that you  
24 have to specifically identify that shows that the relief is  
25 not in the best interest of creditors and the estate and you



1 would have to also show that the act or omission is one for  
2 which there exists a reasonable justification and that will be  
3 cured. Now, you're arguing about the -- your argument I guess  
4 is that some of the -- or maybe it would be best to  
5 characterize this a most important of these payments that were  
6 improperly made have been returned. So that that is a --  
7 you're arguing that that has been cured but you can't tell me  
8 that there's a reasonable justification for the principal to  
9 have paid his own American Express bill with estate money  
10 post-petition. There's no reasonable justification for that.

11 MR. MAROTTA: All of those -- we list all of his  
12 expenses that were paid by the DIP in those several weeks  
13 following the filing.

14 THE COURT: It went on for longer than several weeks  
15 but yes.

16 MR. MAROTTA: Well, there weren't any in the month of  
17 April and there haven't been any in the month of May. So --

18 THE COURT: But there was no -- but we have to go by  
19 what the statute says.

20 MR. MAROTTA: I understand, Your Honor. So the  
21 reasonable justification was that the debtor believed that  
22 paying salary to Mr. Love in accordance with what they had  
23 been doing in the past --

24 THE COURT: Paying his own American Express bill?

25 MR. MAROTTA: It's part of his salary. He took it as

1 a payment of salary.

2 THE COURT: He was paying his own American Express  
3 bill. The debtor is Mr. Love. He's a hundred percent owner  
4 of the company; right?

5 MR. MAROTTA: Yes.

6 THE COURT: So paying his -- he believed that paying  
7 his own American Express bill was in the best interests -- you  
8 think that was somehow justifiable?

9 MR. MAROTTA: Well, he believed it to be reasonable  
10 at the time and he corrected it and there has not been any  
11 payments to him even before this -- the last court appearance  
12 here and since the issue has been raised he has paid back into  
13 the -- the DIP has reclaimed from its principals over  
14 \$38,000.00.

15 THE COURT: And that I guess goes to this -- the  
16 thing that was testified about in the 2004 exam. Mr. Love  
17 took a loan or maybe it was not a loan from a friend and did  
18 he make a loan to the debtor.

19 MR. MAROTTA: It's not a loan to the debtor and he  
20 testified to that at the examination. So I'm not sure why  
21 counsel would stand here and say otherwise.

22 THE COURT: He says it's a loan to himself?

23 MR. MAROTTA: It's a loan that he borrowed from a  
24 friend.

25 THE COURT: So did he -- how did the loan get to the

1 debtor? How did the money get to the debtor then? Is this a  
2 donation?

3 MR. MAROTTA: Yes.

4 THE COURT: Okay.

5 MR. MAROTTA: He has not expectation of repaying it  
6 which he testified to. He is not taking a administrative  
7 super priority claim or anything to that effect or seeking  
8 same.

9 THE COURT: The next question I would have is this  
10 plan is unconfirmable on its face it seems to me.

11 MR. MAROTTA: Mr. Gabor will have to address that  
12 issue. I can address all the issues regarding cause but if  
13 you'd like to hear Mr. Gabor he'll talk about the plan but I  
14 would like to address some of the things that were raise  
15 during Mr. Schwartz's motion.

16 THE COURT: Such as what?

17 MR. MAROTTA: Well, the -- for example, that there's  
18 a continuing loss to the estate. The debtor has made the  
19 April payment that was directed by Your Honor.

20 THE COURT: There was \$85,000.00 operating loss  
21 cumulatively since the beginning of this case not including  
22 the payments that were required to be made to Sovereign Bank  
23 and have not been made. If you add that in that's  
24 \$95,000.000. That's an aggregate loss of \$180,000.00.

25 MR. GABOR: Your Honor, may I address those points?

1 THE COURT: Yes. And there's been a loss every  
2 single month. So how is that not a continuing and substantial  
3 loss to the estate?

4 MR. GABOR: Your Honor, we agree that the cash loss  
5 is approximately \$7,800.00.

6 THE COURT: Well, that's an operating loss; right?

7 MR. GABOR: Correct. Okay. So the loss -- and  
8 that's for the period of time --

9 THE COURT: Correct.

10 MR. GABOR: -- that the debtor has been in Chapter  
11 11. The eight something thousand dollar loss includes  
12 depreciation expense which is a non cash item. This is a real  
13 estate entity. Depreciation is going to be there. It's going  
14 to be the biggest expense and it's not reflected --

15 THE COURT: How much of that is depreciation?

16 MR. GABOR: \$80,000.00.

17 THE COURT: Eight of the 85 is depreciation?

18 MR. GABOR: Well, if it's \$85,000.00 loss and the  
19 cash loss is \$7,800.00 the difference is all depreciation.

20 THE COURT: But then you have to add in the  
21 \$95,000.00 that you haven't paid to Sovereign.

22 MR. GABOR: I'd like to address that, Your Honor,  
23 starting with January. In the January operating report there  
24 was a loss of approximately \$44,000.00. The rents had already  
25 been collected pre-petition for January. So that January is

1 not properly reflected because you have expenses but you have  
2 no income. So if you start with the \$7,800.00 loss I submit  
3 that to that we should add the \$44,000.00 in expenses because  
4 if you had the income in there, if you had a proper accrual  
5 and a matching of income and expenses then you would not have  
6 a \$44,000.00 loss for January. So I submit that that should  
7 be added to the number.

8 The loss also reflects payments of rent of  
9 \$18,000.00 to Adamo. Those payments have ceased.

10 THE COURT: But they're gone. They're not  
11 recoverable?

12 MR. GABOR: Right. But if we're talking about the  
13 loss as indicative of whether a plan could be proposed --  
14 forget about the Sovereign issue on the plan right now, but to  
15 show that there is a cash flow that can fund a plan.

16 THE COURT: The cash flow is one thing but you also  
17 have to have -- make an operating profit --

18 MR. GABOR: Right. And I'm --

19 THE COURT: -- on a non cash basis as well.

20 MR. GABOR: And what I'm trying to do is recast the  
21 operations for the time period that we've been in bankruptcy  
22 so that the court or a reader of the disclosure statement can  
23 say you know what, while there was a loss I understand that if  
24 we recast it there is an operating profit, there is a cash  
25 flow profit and that can fund the plan.

1 THE COURT: But I don't think there is.

2 MR. GABOR: That's why I'd like to --

3 THE COURT: I think there's not.

4 MR. GABOR: That's why I'd like to go through this  
5 exercise if Your Honor says okay.

6 So we have the \$18,000.00 payments to Adamo which  
7 has been deducted. It's included in the \$7,800.00 loss but  
8 that doesn't exist any more. So on a going forward basis, on  
9 a looking forward basis there's that much more profit there.  
10 So I submit that that should be added to the loss.

11 The debtor also made an adequate protection payment  
12 in April of \$19,000.00.

13 THE COURT: But that's not reflected on the operating  
14 statement.

15 MR. GABOR: That was reflected in the April operating  
16 statement.

17 THE COURT: Is that correct?

18 MR. GABOR: In May 2000. Are you asking me, Your  
19 Honor?

20 THE COURT: I'm asking the Sovereign lawyer.

21 MR. SCHWARTZ: Yes, Your Honor. It's reflected in  
22 the April report that was filed I guess last week, yes.

23 THE COURT: But the amount that is owed and has to be  
24 paid by the end of May isn't reflected?

25 MR. GABOR: That's correct and I'll address that

1 also.

2           So if you start with the \$7,800.00, add that to  
3 \$44,000.00 from January, add that to \$18,000.00, add that to  
4 \$19,000.00 in the payment from April that equals a profit of  
5 \$73,000.00.

6           THE COURT: And if you add back a lot of other things  
7 then that would increase the profit even more --

8           MR. GABOR: Please, Your Honor.

9           THE COURT: -- and if my grandmother had wheels  
10 she'd be a tea cart.

11           MR. GABOR: With the \$73,000.00 then if you take the  
12 \$19,000.00 of adequate protection payments and there's three-  
13 and-a-half months worth -- I'm sorry, three months at  
14 \$57,000.00 so you have \$73,000.00 minus the \$57,000.00 leaves  
15 a profit of \$16,000.00 for the three-and-a-half month period  
16 and that's indicative of going forward.

17           I'd like to take it one step further. Sovereign  
18 complains about payments made to -- to or on behalf of Mr.  
19 Love. He states on one hand these are improper payments and  
20 he states on the other hand that there's a loss. To truly  
21 gauge what the debtor can do at this point going forward we  
22 have to segregate those payments and say that well, if they  
23 were improper let's not look at them from a cash flow basis  
24 going forward and what the debtor tried to do was to show what  
25 the principal did, Mr. Love, in order to show what the debtor

1 can do he paid back voluntarily \$39,000.00 to cover those  
2 expenses. So by adding back the \$39,000.00 it's almost as if  
3 those expenses were not there.

4           So if we take the \$16,000.00, add that to \$39,000.00  
5 we have a net profit on a cash flow basis indicative of what  
6 the debtor can do going forward of \$55,000.00 for the three-  
7 and-a-half month period and that's after paying Northfield,  
8 paying Sovereign \$19,000.00 a month on adequate protection and  
9 paying all the other expenses. So I submit as a recast profit  
10 and loss statement --

11           THE COURT: This is not something that I am going to  
12 be able to agree to at this point. You're going to -- we  
13 would have to have a hearing for me in order to be able to  
14 consider and accept the assumptions that you want me to make  
15 about what your operation is going to be going forward.

16           But tell me about how you would -- what -- why this  
17 plan isn't just a form that is -- has no chance of  
18 confirmation. Your treatment of -- you say you are going to  
19 treat Sovereign as unimpaired. Your description of how they're  
20 going to be treated in the disclosure statement is not a  
21 treatment that would constitute being unimpaired. You say  
22 you're going to pay their principle and interest going  
23 forward.

24           MR. GABOR: That's correct, Your Honor.

25           THE COURT: That's not unimpaired. That's not



1 treating a creditor as unimpaired. To treat a creditor as  
2 unimpaired you'd have to complete -- you have to reinstate the  
3 loan and pay it according to its contractual terms. You'd  
4 have to pay all the arrears and at confirmation at one time.

5 MR. GABOR: Your Honor, I had conversations with  
6 counsel for Sovereign and we spoke about a plan and what  
7 Sovereign may or may not agree to. This is -- what was  
8 proposed except for the period of time was what counsel and I  
9 had discussed.

10 THE COURT: But this is phoney. This isn't  
11 unimpaired. That's not unimpaired.

12 MR. GABOR: Your Honor, I didn't expect the plan to  
13 go through on the first time.

14 THE COURT: Well, you don't file a plan that says  
15 that somebody is unimpaired when they patently are not.

16 MR. GABOR: Your Honor, I would --

17 THE COURT: Based on that plan I can't -- I couldn't  
18 assume -- that's not a plan that would -- that could be  
19 confirmed.

20 MR. GABOR: Your Honor --

21 THE COURT: I'd give that plan no weight whatsoever.

22 MR. GABOR: I would have to amend the provisions and  
23 come up with a treatment for Sovereign.

24 THE COURT: Well, but why -- why would I give that  
25 plan any weight? Why wouldn't I just dismiss this case right

1 now or convert this case right now because there's clearly  
2 been gross -- there's clearly been mismanagement. There's no  
3 reasonable justification and there's -- well, whether there's  
4 reasonable justification or not and whether or not there is --  
5 whether or not you have cured some or all of these supposed --  
6 these items there's no -- there's no plan that's been proposed  
7 that has a hope of confirmation because this plan is  
8 unconfirmable on its face.

9 MR. GABOR: Your Honor, we -- our plan proposes that  
10 Sovereign will get everything that's due them.

11 THE COURT: No. Your plan proposes that they will be  
12 unimpaired and they're not unimpaired the way you're treating  
13 them under the plan.

14 MR. GABOR: Well, then --

15 THE COURT: If a treatment that you're proposing for  
16 them is characterized as unimpaired so that you won't have to  
17 obtain and vote but they're not unimpaired because you're not  
18 curing and reinstating the loan.

19 MR. GABOR: So while they may be unimpaired they are  
20 still getting everything that would be due them --

21 THE COURT: But you can't confirm this plan without  
22 their consent.

23 MR. GABOR: And ultimately I'm hoping to get their  
24 consent. I did have conversations with --

25 THE COURT: But they're here trying to convert this

1 case. Obviously you don't have their consent.

2 MR. GABOR: Well, at the time --

3 THE COURT: We can ask counsel whether he consents,  
4 whether his client consents.

5 MR. SCHWARTZ: No, Your Honor.

6 THE COURT: So why wouldn't -- why isn't that a basis  
7 for me to convert this case today?

8 MR. GABOR: Well, I would like the opportunity to  
9 amend the plan and put in something that we can try to get  
10 confirmed.

11 THE COURT: Well, then why would I give you that  
12 opportunity? This was that opportunity. This is the hearing  
13 on the motion.

14 MR. GABOR: Well, because it's not the hearing on the  
15 plan.

16 THE COURT: But the plan -- you have to have -- in  
17 order for me to conclude that I don't have to -- that I have  
18 discretion to not convert this case you would have to show  
19 that there's a reasonable likelihood that a plan will be  
20 confirmed within the time frames established in Section  
21 1121(e) and 1129(e) of this title or with -- or if these  
22 sections do not apply within a reasonable period of time.

23 MR. GABOR: Your Honor, the debtor has done  
24 everything that has been asked of him and he's cleaned up  
25 every complaint that's been made. He's complied with all of

1 the requests of the U.S. Trustee. Anything that's deemed to  
2 be improper he's cleaned up. He's repaid voluntarily. He's  
3 done everything so that he can take advantage of the second  
4 chance that bankruptcy enables a person to take advantage of.  
5 He would like to go forward --

6 THE COURT: I'm concerned that this debtor still  
7 thinks that he's entitled to treat this entity as his personal  
8 ATM.

9 MR. GABOR: Your Honor, that's just not the case.  
10 Whatever it may have appeared to happen at the beginning since  
11 the last court date he's not done anything of the sort.

12 THE COURT: Who's going to be given the right to  
13 investigate and prosecute the potential avoidance action  
14 against -- that might arise or who's going to look into the  
15 pre-petition transfers to the debtor's insiders and determine  
16 whether any or all of them were avoidable?

17 MR. GABOR: Well, Sovereign has been looking into it.  
18 They started with the 2004 examination, Your Honor.

19 THE COURT: Well, in the absence -- but the debtor --  
20 there's no creditors' committee here and the debtor-in-  
21 possession is not going to do it.

22 MR. GABOR: Your Honor, we'll look into it. I've not  
23 seen the transcript of the 2004. I was not there.

24 THE COURT: You're obviously not going to look into  
25 it. We're talking about looking into causes of action against

1 your own client.

2 MR. GABOR: Well, no. The debtor is our client, Your  
3 Honor, not the principal.

4 THE COURT: Right. But you take your instructions  
5 from Mr. Love.

6 MR. MAROTTA: For example, Your Honor, we are  
7 looking into it. Counsel at the 2004 examination was asking  
8 about -- he mentioned some \$140,000.00 in payments that had  
9 been made. This was a separate -- it's a separate account  
10 that had been set up by the debtor almost a couple of years  
11 ago that came from the proceeds of the Northfield loan. All  
12 of these proceeds were used for the reconstruction of a  
13 building at 2531 Victory Boulevard. There would be  
14 documentation to support this work. There would be work  
15 permits that are matters of public record. There would be the  
16 actual work that was done. There would be receipts.

17 In the event that there is somewhere in that  
18 accounting some improper transfers that's an issue that the  
19 debtor can look at and has shown the ability to look at a  
20 transfer of that in its normal course of business it would not  
21 have looked at but now that it's in bankruptcy has -- the DIP  
22 has taken the -- made the effort to look at these payments to  
23 Mr. Love, for example, and to find that Mr. Love should pay  
24 the --

25 THE COURT: That's because he was told to do so and

1 not because -- not because he in his, you know, because he  
2 undertook in the exercise of his fiduciary duty to do that.  
3 He was under pressure by the U.S. Trustee and the creditor.  
4 He wasn't doing that on his own.

5 MR. MAROTTA: But he has cured it within a reasonable  
6 time and \$10,000.00 a month salary would not be an  
7 extraordinary salary for a person who's a community business  
8 leader like this person is and who has -- is managing \$9  
9 million worth of real estate.

10 THE COURT: Is he receiving any salary at the moment?

11 MR. MAROTTA: No. He hasn't because there hasn't  
12 been money to take it and it only would be coming from the  
13 Northfield account as Your Honor directed and so he hasn't.  
14 He's agreed to waive his April salary and he's agreed to waive  
15 his May salary.

16 THE COURT: He has no authority to pay himself  
17 anything at the present time. You understand that?

18 MR. MAROTTA: Well, Your Honor had that he can only  
19 pay himself whatever was in the budget out of the Northfield  
20 funds I believe but then again he hasn't made any payments to  
21 himself in the entire month of April or May. So if Your Honor  
22 directs that no further payments then -- so be it.

23 THE COURT: Let me hear from counsel for Sovereign.

24 MR. MAROTTA: I didn't really get a chance to address  
25 any of the points that they had raised though and I would like

1 the chance to do so.

2 THE COURT: Well, you told me that your client has  
3 cured everything. So that is -- doesn't that address the  
4 point?

5 MR. MAROTTA: Certainly this is in our motion papers  
6 but as Your Honor knows they did set up a segregated account,  
7 accounts for Northfield and Sovereign as Your Honor directed.  
8 They did establish a budget. Despite what counsel says they  
9 did provide an accounting of the January expenses building by  
10 building as Your Honor directed.

11 In our motion papers we attached -- in our  
12 objections rather we attached a full ledger sheet of all  
13 disbursements from January 11<sup>th</sup> forward with a description of  
14 each item as Exhibit A.

15 THE COURT: Mr. Marotta, I don't think I need to hear  
16 any more but thank you.

17 MR. MAROTTA: Okay.

18 THE COURT: I'll hear from the Sovereign attorney  
19 briefly.

20 MR. SCHWARTZ: Your Honor, I'll just address a couple  
21 of things that counsel for the debtor said and then I'll give  
22 a quick sort of closing statement.

23 Number one, we were talking about whether or not the  
24 debtor has suffered substantial and continuing losses or  
25 diminishment of value to the estate and counsel talked about

1 most of this was depreciation. Well, I just looked at the  
2 April monthly operating report. Total depreciation is listed  
3 as \$63,848.00. So it's not the whole thing at \$63,848.00.

4 Counsel talked about he did some math and he was  
5 hard to follow and as George Bush once said fuzzy math, and I  
6 think that's what he was doing. He talked about there were  
7 expenses in January which he wanted to back out because there  
8 was no rents in January. Well, Your Honor, what's interesting  
9 is that the debtor in its projections talks about \$81,000.00 a  
10 month. The debtor in its declaration filed with this court  
11 talked about \$60,000.00 a month. One would think that the  
12 debtor received somewhere between \$60,000.00 and \$81,000.00 in  
13 January for rents yet on the day that the debtor filed his  
14 bankruptcy petition the debtor filed schedules and those  
15 schedules show that the debtor had in his account \$450.00. So  
16 where did \$80,000.00 or \$60,000.00 disappear to when all the  
17 expenses were paid on a post-petition basis. Very interesting  
18 question, Your Honor. That was Sovereign's cash collateral, a  
19 portion of that. Disappeared without a trace.

20 The \$38,500.00 loan contribution, whatever you want  
21 to call it that Mr. Love made to the debtor in April that  
22 counsel would like to back out now well, that's already  
23 accounted for in the April monthly operating report. So the  
24 debtor wants to back it out and say that you have to now say  
25 that \$38,000.00 should come out which would give the debtor



1 more of an operating profit. Well, it's already accounted for  
2 in April and so if you back it out again you've now backed it  
3 out twice, Your Honor.

4 Again, Your Honor, I'll point Your Honor to the  
5 statute and I know Your Honor understands that.

6 THE COURT: Okay. I think the way I'm coming out on  
7 this is that we need to have an evidentiary hearing because I  
8 think -- I would like to have a better record than this to  
9 decide this case. All right.

10 So I can give you some time on June 1<sup>st</sup>. I can give  
11 you most of the day on June 1<sup>st</sup>. Are we be okay with that?  
12 Starting at 10:00 in the morning. And I'll direct you to file  
13 a joint pretrial order by close of business a week from  
14 tomorrow. June 1<sup>st</sup> is a Tuesday.

15 MR. SCHWARTZ: Your Honor, unfortunately June 1<sup>st</sup>  
16 doesn't work for us. Does Your Honor have any other time that  
17 week?

18 THE COURT: No, I don't have any other time that  
19 week.

20 MR. SCHWARTZ: Is there any time before that week?

21 THE COURT: I think we have a trial all week.

22 [Pause in proceedings.]

23 THE COURT: I could give you some time on the 28<sup>th</sup> but  
24 it would not be a full day. So I don't know whether there is  
25 any point in doing that.

1 MR. GABOR: And I'm not available that day, Your  
2 Honor.

3 [Pause in proceedings.]

4 THE COURT: I could give you June 11<sup>th</sup> which is a  
5 Friday all day. I could give you June 18<sup>th</sup>.

6 MR. SCHWARTZ: June 11<sup>th</sup> works for us, Your Honor.

7 THE COURT: What's that?

8 MR. SCHWARTZ: June 11<sup>th</sup> works for us.

9 MR. GABOR: June 18<sup>th</sup> would be better for us, Your  
10 Honor.

11 MR. SCHWARTZ: I don't know about working better but  
12 I know the statute does talk about time frames for a motion to  
13 convert and requires that a motion be heard and decided within  
14 certain time frames.

15 THE COURT: What is the time frame that's required?

16 MR. SCHWARTZ: The statute, Your Honor, 1112(b)(3)  
17 says that the court shall commence the hearing on a motion  
18 under subsection not later than thirty days after the filing  
19 of the motion, shall decide the motion not later than fifteen  
20 days after commencement of such hearing.

21 THE COURT: Okay. So we -- so it has to be decided  
22 not less than fifteen days after today's date? When was --

23 MR. SCHWARTZ: That's what the statute says, Your  
24 Honor. Obviously if we consent then that time frame can  
25 change and we certainly -- I'll try to be reasonable here so I

1 just don't want it to go out until the end of June because --

2 THE COURT: Okay. Well, what's the time frame that  
3 you think that it needs to be decided? When -- if you say it  
4 has to be -- the hearing has to be commenced within thirty  
5 days after it's filed. So it was filed -- your motion was  
6 filed on the 28<sup>th</sup> of April.

7 MR. SCHWARTZ: Well, we commenced it today.

8 THE COURT: And we commenced it today. And you feel  
9 that it has to be decided within fifteen days of the day that  
10 it's commenced. If that's the case then I'll have to put it  
11 on for June 1<sup>st</sup> --

12 MR. GABOR: Would it be commenced or completed, Your  
13 Honor?

14 THE COURT: -- which is my first early available  
15 date. I'm sorry.

16 MR. GABOR: Would it be fifteen days after it's  
17 commenced or completed the hearing?

18 THE COURT: What's -- what section of the statute is  
19 it, Counsel?

20 MR. SCHWARTZ: I'm sorry.

21 THE COURT: What section of the statute is it?

22 MR. SCHWARTZ: It's 1112(b)(3), Your Honor.

23 THE COURT: Okay. Well, you -- the motion is to be  
24 decided within fifteen days. So I can hear you on the 1<sup>st</sup>.  
25 That's my next available date. I can hear you the 28<sup>th</sup> and I

1 can hear you the 1<sup>st</sup>. Those are my next two available dates  
2 within the fifteen day period.

3 MR. SCHWARTZ: Your Honor, I'll move things around on  
4 my calendar and I'll be here on the 1<sup>st</sup> then.

5 THE COURT: Okay. All right. So -- and I'm  
6 directing you as I said to file a joint pretrial order by the  
7 close of business on May 27<sup>th</sup>.

8 [Pause in proceedings.]

9 MR. CURTIN: Your Honor, will you carry our motion  
10 pending the outcome of this motion?

11 THE COURT: Yes. What's -- did your office have a  
12 position on any of this?

13 MR. CURTIN: Your Honor, we were prepared to consent  
14 to a short adjournment. I'm not going to get into the reasons  
15 why but we may take a position at this hearing but I'm not  
16 quite sure yet. So if you would just carry our motion. We may  
17 just let the parties litigate it.

18 THE COURT: Well, let's start this at -- I'm prepared  
19 to start it at nine or 9:30.

20 MR. SCHWARTZ: 9:30 looks better since I'm coming  
21 from New Jersey, Your Honor.

22 THE COURT: So I'll start it at 9:30.

23 MR. MAROTTA: Do you intend to continue through the  
24 entire day, Your Honor?

25 THE COURT: Yes.

1 MR. MAROTTA: What time will we be concluding?

2 THE COURT: I don't know. Maybe we'll just have to  
3 keep going until we finish. If this has to be decided within  
4 fifteen days of the date that the hearing was commenced then  
5 we may just have to keep going until we finish that day.  
6 We'll have to see how it goes.

7 MR. MAROTTA: I'd just like to say that I have an  
8 election that night that I need to be present for.

9 THE COURT: I didn't write the statute.

10 So joint pretrial order. Does anybody have any  
11 questions about a joint pretrial order?

12 MR. SCHWARTZ: Is there a form on the website, Your  
13 Honor?

14 THE COURT: I think there is. My form is on the  
15 website.

16 MR. SCHWARTZ: Thank you.

17 THE COURT: Does anybody have any questions?

18 MR. SCHWARTZ: The only other issue, Your Honor, is  
19 that there's another motion on the calendar. It's our motion  
20 for stay relief or alternatively for a determination of the  
21 stay that doesn't apply.

22 THE COURT: Just let me ask you one question about  
23 this. Why is it -- why do you -- why is it important to you  
24 to have the judgment entered? What effect does that have in  
25 your mind on your claim or why does that -- what's the reason

1 for that, for you wanting that?

2 MR. SCHWARTZ: Because, Your Honor, I feel that the  
3 liquidation of our claim is important given the fact that the  
4 debtor --

5 THE COURT: But the claim has already been  
6 liquidated. So what's the point of -- if it can be -- the  
7 claim has been -- the decision has been made by the court. So  
8 what is the entry of the judgment add in your view?

9 MR. SCHWARTZ: Well, the opinion, Your Honor, doesn't  
10 liquidate the amount of the judgment. The opinion directed the  
11 parties to submit an order which would become a judgment which  
12 Sovereign did which the court entered.

13 THE COURT: The court signed it.

14 MR. SCHWARTZ: The court signed it. The debtor  
15 contends that that was signed the day after the petition was  
16 filed. So it wasn't formally entered on the docket in the  
17 state court. So the debtor is contending that our claim is  
18 one number. We obviously disagree with the debtor's contention  
19 and the debtor sets forth a number in its plan which is lower  
20 than the number that we contend. So we --

21 THE COURT: So you're saying that I would lift the  
22 stay so that you could file -- have a judgment filed to  
23 preclude the debtor from challenging that -- the amount of the  
24 number.

25 MR. SCHWARTZ: Yes.

1           THE COURT: So why would I -- if you can't challenge  
2 it -- if they can't -- if they can challenge it now why would  
3 I allow you to lift the stay to preclude them from challenging  
4 it?

5           MR. SCHWARTZ: I don't believe they can challenge it,  
6 Your Honor.

7           THE COURT: Well, then what's what point of lifting  
8 the stay?

9           MR. SCHWARTZ: The whole purpose, Your Honor, is I  
10 believe the debtor filed this bankruptcy in the first place  
11 because as Mr. Love testified during his Rule 2004 examination  
12 he believed that the state court was wrong in its decision.  
13 Sovereign filed an action. The debtor asserted a counterclaim  
14 based upon lender liability and other things, the same  
15 allegations that the debtor makes in its papers in response to  
16 our motion to convert and now the debtor or this court is  
17 going to seek to relitigate those same issues that they  
18 decided.

19           THE COURT: But is that -- what precludes them from  
20 doing that, what principle of law would preclude them from  
21 doing that?

22           MR. SCHWARTZ: I believe that collateral estoppel  
23 does, Your Honor.

24           THE COURT: So collateral -- you believe that  
25 collateral estoppel applies even though the judgment was

1 signed -- that fixes the amount of the claim was filed post-  
2 petition -- was signed post-petition. You believe that the  
3 collateral estoppel still applies?

4 MR. SCHWARTZ: Yes, I do, Your Honor. I believe that  
5 it does because of the opinion. The issue was fully and  
6 finally decided and I also believe that the Rooker Feldman  
7 doctrine prevents --

8 THE COURT: But doesn't Rooker Feldman -- you have to  
9 have something that has to have been litigated to a final  
10 conclusion.

11 MR. SCHWARTZ: And I believe there was, Your Honor.

12 THE COURT: Well, if that's the case then you don't  
13 need for me to lift the stay for you to enter that judgment.

14 MR. SCHWARTZ: Well, the -- that's why I took the  
15 position, Your Honor, that the act of the entry of the  
16 judgment by the state court is nothing other than ministerial.

17 THE COURT: So your belief that it has a substant --  
18 you think it doesn't have a substantive effect. You think  
19 that you have the same rights, you're in the same position as  
20 far as the applicability of collateral estoppel and Rooker  
21 Feldman is concerned whether or not the judgment was signed  
22 pre-petition or post-petition.

23 MR. SCHWARTZ: As I stand here today, Your Honor, I  
24 would say but obviously the debtor would say no and we're  
25 going to get into an issue before this court as to whether or



1 not there is any substantive issues.

2 THE COURT: See, my point is though if it is an issue  
3 why would I lift the stay to allow you to cut off discussion  
4 of that issue? And if it isn't an issue then there's no --  
5 you don't have any need for the stay to be lifted.

6 MR. SCHWARTZ: Well, if it is a substantive issue,  
7 Your Honor, then I believe that the Sonex case allows us to go  
8 back to the state court to decide that substantive issue given  
9 the fact that the state court had heard everything up until  
10 that point, had fully and finally for the most part decided  
11 all the issues and the only thing that's left is again -- I'll  
12 call it the ministerial act of entering judgment whereas if it  
13 was -- if it is -- if going back to state court is substantive  
14 and then you're not -- you don't allow Sovereign to go back  
15 and don't lift the stay and the debtor then seeks to  
16 relitigate those issues before this court we're going to get  
17 into an issue as to whether or not Rooker Feldman applies,  
18 whether or not collateral estoppel applies.

19 THE COURT: I guess your point is that even -- let's  
20 suppose that this were a situation where the case had been --  
21 the case had been tried to the state court but there wasn't a  
22 decision yet, there's no Rooker Feldman there, no collateral  
23 estoppel there.

24 MR. SCHWARTZ: Correct.

25 THE COURT: But even so you would say in that

1 circumstance under the principles articulated in Sonex,  
2 judicial economy and so forth, I should send the case back to  
3 the state court to complete the process of liquidating the  
4 claim which is certainly something a state court is in a  
5 position to do.

6 MR. SCHWARTZ: Absolutely, Your Honor.

7 THE COURT: Mr. Marotta.

8 MR. MAROTTA: Your Honor asked the question why.

9 THE COURT: Well, I got an answer to that. My  
10 question to you is why wouldn't I let -- why isn't this a  
11 matter that is appropriately brought to a conclusion by state  
12 court which is simply just the fixing of the amount of  
13 Sovereign's claim? Why should this court undertake that  
14 process when it's already been done by the state court?

15 MR. MAROTTA: Because as Your Honor may remember when  
16 counsel was here last time they represented to this court that  
17 there was a mortgage that was filed securing their claim. We  
18 now know that --

19 THE COURT: We're talking about the liquidation of  
20 the amount of their note. Is that correct? Because that's  
21 all we're talking about now.

22 MR. MAROTTA: Except for what they're asking is they  
23 want to lift the stay so they could docket the judgment in  
24 state court. The reason that they want to docket the judgment  
25 in state court is so that they can have a lien that attaches

1 to the debtor's other --

2 THE COURT: That's not -- I don't think that's what  
3 they're -- I would have to lift the stay for that purpose and  
4 I would -- and I don't think that's what they're asking for.  
5 They're not asking to lift the stay for the purpose of  
6 attaching a lien, a judgment lien to the property.

7 Is that right, Mr. --

8 MR. SCHWARTZ: That's absolutely correct, Your Honor.  
9 All we're seeking to do is liquidate our claim.

10 THE COURT: So understanding that is there any reason  
11 why I shouldn't lift the stay to allow the process of  
12 liquidation of this claim which proceeded to a conclusion  
13 essentially in state court to be finally completed so that we  
14 know what number we're working with in this proceeding? I  
15 think that might actually facilitate the determination of some  
16 of the issues that we're going to have to decide in the  
17 context of the motion to convert the case because now we will  
18 know the amount of Sovereign's claim that has to be dealt with  
19 in the context of the plan.

20 MR. MAROTTA: Except for the difference is, Judge,  
21 that as we stand here today Sovereign has an unsecured claim.

22 THE COURT: That's what you say. I don't know what  
23 they say but they're asking -- they're just asking to --  
24 they're just asking to fix the amount of the claim here. This  
25 does not relate to whether the claim is secured or not

1   secured; correct?

2               MR. SCHWARTZ: Correct.

3               MR. MAROTTA: Well, if the judgment was docketed,  
4   which we put this in our papers, if the judgment is docketed  
5   it then becomes a secured claim.

6               THE COURT: Not unless I lift the stay to allow the  
7   judgment to become a secured claim. I would have to lift the  
8   stay for that purpose.

9               MR. MAROTTA: But then would it not attach to the  
10   other property of the debtor? For example, there are two  
11   vacant lots that are not encumbered by a mortgage. Wouldn't  
12   this give them a leg up on the other creditors in the estate?

13              THE COURT: I would not lift the stay for the purpose  
14   of permitting them to perfect any lien on the property by --  
15   whether by filing of a judgment or otherwise. I'd lift the  
16   stay only to permit them to finalize the liquidation of their  
17   claim, the liquidation of the amount of their claim.

18              MR. MAROTTA: And not allow them to docket the  
19   judgment? That's all they've been asking --

20              THE COURT: If they docket it -- unless I -- if  
21   they -- I would have to lift the stay -- they can do anything  
22   they want to but unless the stay has been lifted to permit  
23   that to occur then it is of no course and effect. So even if  
24   they docket the judgment if I haven't lifted the stay to  
25   permit them to perfect their lien or to obtain a judgment lien

1 that -- they don't have the ability to do that. Isn't that  
2 correct?

3 MR. SCHWARTZ: Yes, Your Honor. In fact, if Your  
4 Honor would want to interlineate in the order that I submitted  
5 that the stay would be lifted solely to allow Sovereign to  
6 liquidate the amount of its claim and for no other purposes I  
7 would have no objection to that.

8 THE COURT: So with that is there any objection?

9 MR. MAROTTA: Well, there is. The debtor's principal  
10 is also a guarantor.

11 THE COURT: Well, that's -- why should that concern  
12 me?

13 MR. MAROTTA: Well, it doesn't. Actually that issue  
14 has been addressed at the state court and there's a hearing on  
15 the 21<sup>st</sup> of June before the state court on that -- on this  
16 issue.

17 THE COURT: So then why -- that doesn't seem to me to  
18 pose any obstacle to lifting the stay.

19 MR. MAROTTA: Well, I want to talk about Sonex  
20 factors but before I mention that it's premature to lift the  
21 stay at this juncture because the debtor has proposed the  
22 plan.

23 THE COURT: No. But I think that it is important in  
24 the context of evaluating the debtor's plan for the stay to be  
25 lifted to permit this claim to be liquidated.

1 MR. MAROTTA: And that can be done in this court.

2 THE COURT: But why would I start over again? It  
3 seems to me that all of the factors in Sonex relating to the  
4 judicial economy --

5 MR. MAROTTA: One would be that it wouldn't really  
6 fully liquidate the claim and the reason would be that the  
7 state court was only looking at the notes. They made a motion  
8 for summary judgment in lieu of complaint and under the CPLR,  
9 the State of New York that has to be limited to an instrument  
10 for the payment of money only. Therefore, it excludes the  
11 mortgages and any of the loan document that would require  
12 payments of tax, escrows and the like.

13 Now, some of the taxes that are --

14 THE COURT: So is Sonex is going to be -- excuse me,  
15 is Sovereign going to be seeking those amounts that are not --  
16 in other words, if your -- if your claim is fixed by the entry  
17 of this judgment, are there additional amounts that would have  
18 to be determined --

19 MR. SCHWARTZ: No, Your Honor.

20 THE COURT: -- other than -- other than anything  
21 that might have accrued post-judgment?

22 MR. MAROTTA: The amounts that Sovereign owes the  
23 debtor that constitute escrow payments for which they  
24 collected during -- for a tax period during which they should  
25 have paid taxes during which they did not pay taxes and then

1 there's also the --

2 THE COURT: Wait, wait, wait. Sovereign owes the  
3 debtor?

4 MR. MAROTTA: Yes.

5 THE COURT: But what's that got to do with whether  
6 Sovereign's claim should be liquidated? You're saying you  
7 have counterclaims against the debtor or something, against  
8 Sovereign or something like that.

9 MR. MAROTTA: It's the first factor of Sonex. It  
10 does not provide a complete resolution of the issues --

11 THE COURT: Well, it provides --

12 MR. MAROTTA: -- between the parties.

13 THE COURT: It provides a complete resolution of the  
14 issue of the amount of Sovereign's claim.

15 MR. MAROTTA: But it doesn't because the amounts of  
16 the monthly payments included these escrows and the entire  
17 dispute with Sovereign centers around the fact that they were  
18 never able to tell us what the amount of the monthly payments  
19 were --

20 THE COURT: Aren't these --

21 MR. MAROTTA: -- and how much of it were attributable  
22 to escrow.

23 THE COURT: Are these not issues that were taken --  
24 that were addressed before the state court?

25 MR. MAROTTA: No. The only issue that was

1 addressed --

2 THE COURT: Why not?

3 MR. MAROTTA: Because the only issue that was  
4 addressed at the state court is that the payments that were  
5 made included escrow and that there was a failure of Sovereign  
6 to provide an escrow accounting and that therefore it's not  
7 simply the instrument for the payment of money only. The  
8 state court was only looking at the notes and the amounts due  
9 under the notes. So it did not adjudicate --

10 THE COURT: It may not resolve all of these questions  
11 but it certainly resolves a very substantial question which is  
12 the amount of Sovereign's claim against the debtor. There may  
13 be some other claims made -- there may or may not be an  
14 ability on the part of the debtors to challenge that or to  
15 seek some kind of offset based upon what you think are amounts  
16 of escrow that were paid that were not properly remitted to  
17 the taxing authorities. There may or may not be an ability to  
18 do that but there is -- but we'll still have gotten a long  
19 way.

20 MR. MAROTTA: Right. Under Sonex, under the first  
21 factor it does not favor dismissal for that reason. It  
22 doesn't provide a complete resolution.

23 The other factors on Sonex yes, it's a state court  
24 and certainly they have jurisdiction to hear this claim but  
25 it's not a specialized tribunal. It's not --



1 THE COURT: They tried the whole case.

2 MR. MAROTTA: But it's not a specialized tribunal.  
3 They don't have any particular expertise or peculiar expertise  
4 as a landlord tenant court does to resolve a lease dispute.

5 Also, on the fifth factor of Sonex, whether there's  
6 an insurer who's representing the debtor. The debtor doesn't  
7 have any insurer that's representing him.

8 THE COURT: That factor comes up only when you're  
9 talking about a malpractice claim or a claim for which the  
10 debtor has insurance. So it's not applicable here.

11 MR. MAROTTA: And I have already said to Your Honor  
12 that prejudice is potentially the rights of the other  
13 creditors.

14 THE COURT: How so?

15 MR. MAROTTA: If there's a judgment that's docketed.  
16 So --

17 THE COURT: How so?

18 MR. MAROTTA: It would give them a lien on the  
19 other --

20 THE COURT: I'm telling you that it would not --

21 MR. MAROTTA: Okay.

22 THE COURT: -- because I won't lift the stay for the  
23 purpose of allowing that to occur.

24 MR. MAROTTA: Well, the only thing left in that state  
25 court decision or that proceeding, that judge -- in front of

1 that judge is whether you should be entering the judgment.

2 THE COURT: The point of entering the judgment I  
3 guess is to fix -- to finally fix the amount of the claim.  
4 That's the point.

5 MR. MAROTTA: I'm kind of -- to be perfectly honest,  
6 I think his November decision said how much the claim was.  
7 The problem was he directed that they submit an order.  
8 Instead of submitting an order where the judge would have  
9 recited the facts, the law and made determinations and entered  
10 an order directing the clerk of the court to enter the  
11 judgment, Sovereign's counsel chose to shortcut the process  
12 and submitted instead a proposed judgment and as I put in our  
13 motion --

14 THE COURT: So --

15 MR. MAROTTA: -- papers -- this is very important,  
16 Your Honor. As I put in our motion papers when you do that in  
17 New York County the clerk's office doesn't take too kindly to  
18 it and so then what happens is that they get a judgment that's  
19 been signed by a judge on January 12<sup>th</sup> and they marked it on  
20 unfiled. So this judgment and this adjudication that they're  
21 pursuing is something really that would require them to make a  
22 calculation of interest and submit additional affidavits to  
23 the clerk's office and prove their claim.

24 THE COURT: Is that correct?

25 MR. SCHWARTZ: Your Honor, I wasn't handling that

1 case and I'm not familiar with the way it works in New York  
2 State court. So I can't answer that question whether -- that  
3 specific question.

4 What I can tell Your Honor though is that the Sonex  
5 factors as we've set forth in our papers favor our --

6 THE COURT: All right. You don't need to go any  
7 further.

8 Mr. Marotta, are you prepared -- so does someone  
9 have this opinion in any of this mass of papers that's online  
10 here, the judge's opinion?

11 MR. SCHWARTZ: I believe it was attached. I'll find  
12 it. It was attached to Sovereign's papers. It's Exhibit K,  
13 Your Honor, to our declaration of Mario Talichian [Ph.] which  
14 we filed in support of our motion to prohibit the debtor from  
15 using cash collateral.

16 THE COURT: Is this the November 10, 2009 opinion --

17 MR. MAROTTA: Yes.

18 THE COURT: -- of Milton Tingling?

19 MR. MAROTTA: Yes.

20 MR. SCHWARTZ: Yes, Your Honor.

21 THE COURT: I don't see a number on this. Is there a  
22 number here?

23 MR. SCHWARTZ: There is no number, Your Honor.

24 THE COURT: There is no number?

25 MR. SCHWARTZ: There is no number.

1           THE COURT: Okay. So this -- where's the judgment,  
2 the proposed judgment?

3           MR. SCHWARTZ: That's Exhibit L, Your Honor, that  
4 same certification.

5           THE COURT: So this was -- so the judge signed this  
6 judgment?

7           MR. SCHWARTZ: On January 12<sup>th</sup>.

8           THE COURT: Right. So how is it they'd have to prove  
9 something up here. If the judge signed the judgment it would  
10 be entered as is; correct? You're saying that even if with a  
11 liquidated amount in the judgment that they want the clerk to  
12 enter that they'd still have to come with additional  
13 affidavits to show additional amounts?

14          MR. MAROTTA: Because they did it incorrectly because  
15 instead of -- the practice in the New York County clerk's  
16 office which I know painfully so well is that you submit the  
17 proposed judgment to the clerk's office but they didn't  
18 fulfill the step that the state court required which was to  
19 submit an order. So instead of submitting an order to Justice  
20 Tingling as he directed they submitted a proposed judgment to  
21 him. He signed the judgment on January 12<sup>th</sup>.

22          THE COURT: Right.

23          MR. MAROTTA: Having done that besides being void ab  
24 initio because it's beyond -- it's the day after the petition  
25 was -- the order of relief the clerk's office in New York

1 County requires the plaintiff then to make affidavits and  
2 present calculations of interest and bill of costs and et  
3 cetera in order --

4 THE COURT: To back up their claim --

5 MR. MAROTTA: Right. And they have to appear in the  
6 clerk's office physically to do so.

7 THE COURT: So why wouldn't I -- if that's the case  
8 then why wouldn't the stay be lifted to permit them to go  
9 ahead and do that --

10 MR. MAROTTA: Your Honor just said that you would --

11 THE COURT: -- fix the amount of their claim?

12 MR. MAROTTA: Except that Your Honor specifically  
13 just said that you are not going to allow them to enter the  
14 judgment or docket the judgment so --

15 THE COURT: Mr. Marotta, let me see if we can get  
16 clear on this particular point. The automatic stay -- because  
17 of the automatic stay an action taken that would violate the  
18 stay has no effect unless the stay has been lifted. Right?  
19 So the court, this court has the authority to modify the stay  
20 to allow a judgment to be entered for some purposes but not  
21 others.

22 So, in other words, unless I lifted the stay to  
23 permit them to obtain a lien on the debtor's property their  
24 entering the judgment would not have the effect of giving them  
25 a lien on the property because the automatic stay would

1 make -- even if under state law in the absence of a bankruptcy  
2 that is what would occur the automatic stay prevents the lien  
3 from attaching unless the bankruptcy court has lifted the stay  
4 to permit that to occur. Are we clear on this?

5 MR. MAROTTA: Yes.

6 THE COURT: Okay. So the point --

7 MR. MAROTTA: There's another that --

8 THE COURT: If your argument is, Mr. Marotta, that  
9 they -- that they did it wrong in state court then why  
10 wouldn't I lift the stay to allow them to go back and submit a  
11 judgment to Justice Tingling along with the appropriate proof  
12 and you can submit whatever you think you should submit in  
13 that connection and we'll let Justice Tingling who handled  
14 this decide the amount of the claim and that will be -- that  
15 will be fixed and we won't have to -- that will be an issue  
16 that we don't have to deal with in the context of this case.

17 MR. MAROTTA: Right. I guess that really boils down  
18 to three issues then. It's because it does not provide a  
19 complete resolution of the claims between the parties and --

20 THE COURT: Well, it provides a complete resolution  
21 of Sovereign's claim against you and that cuts out a lot of  
22 issues in this case for me.

23 MR. MAROTTA: Perhaps but we still have to address  
24 the fact that Sovereign did not record its mortgage. We did  
25 do a final search.

1           THE COURT: But I don't care about that right now.  
2 That's not my issue right now. The issue right now is the  
3 amount of their claim.

4           MR. MAROTTA: But my point is that that's an issue  
5 that has to be addressed between these two parties and it's a  
6 very big issue.

7           THE COURT: That may be but --

8           MR. MAROTTA: It has to be -- it would -- in  
9 confirmation hearings --

10          THE COURT: But the -- but it's -- but it's an  
11 entirely different issue. It's an entirely different issue.  
12 It has nothing to do with the amount of their claim. I think  
13 it would be very useful to know what the amount of their claim  
14 is whether it's secured or unsecured. Calculating the amount  
15 of their claim is a separate issue from the question of  
16 whether their mortgage claim was properly filed or not or  
17 whether their assignment of leases and rents gives them the  
18 requisite security interest or any other argument that they  
19 may wish to make but that's not -- that doesn't have to do  
20 with the amount of their claim. So the fact that I don't have  
21 to deal with another issue doesn't mean that it wouldn't be  
22 helpful to get this issue resolved.

23          MR. MAROTTA: Perhaps and I think that Justice  
24 Tingling also at our last appearance indicated that whatever  
25 decision he would make he would give parties notice so that

1 they could propose counter orders and the like.

2 I would point out that counsel still is saying that  
3 they have not received a payment since April now they're  
4 saying, April 2008. The last time they were here they were  
5 saying May of 2008. The fact is their own counsel, prior  
6 counsel Schiff Hardin said the last payment they received was  
7 February 27, 2009. There's a couple of problems there, Judge,  
8 which is -- one is -- well, first of all, we did provide  
9 copies of canceled checks that support that the debtor made  
10 those interest payments of \$27,000.00 based by the way on  
11 their estimation because they didn't know how much the amount  
12 of the monthly payments were.

13 During the court proceeding, during the state court  
14 proceeding they continued to make those payments through  
15 February 2009. So that's one thing I just wanted to clear up  
16 that was said before.

17 THE COURT: Tell it to Justice Tingling.

18 MR. MAROTTA: What's that?

19 THE COURT: Tell it to Justice Tingling.

20 MR. MAROTTA: Okay. And the other issues under Sonex  
21 were what is the impact of the stay on the parties and the  
22 balance of the harms. Well, if we lift the stay now the  
23 debtor is holding an evidentiary hearing before Your Honor on  
24 June 1<sup>st</sup>, has been forced to go back to state court numerous  
25 times to defend against Sovereign's continuance urgency to



1 that state court judge to enter the judgment against the  
2 debtor also by the way post-petition and will now have to  
3 continue to do that. So now the debtor-in-possession is  
4 engaged in two tribunals.

5 THE COURT: Either you're going to have to do that  
6 here or you're going to do it there and it's --

7 MR. MAROTTA: That's what I'm saying, Your Honor.  
8 Why don't we all do it here?

9 THE COURT: Because I'm not prepared to go back to  
10 square one and reconsider something that a state court judge  
11 has already gone through.

12 MR. MAROTTA: And the other thing I would point out  
13 is that I believe they have an affirmative duty that hey  
14 haven't carried out here which is to tell that state court  
15 judge that they -- that that January 12<sup>th</sup> order was entered  
16 after, was signed after the petition was filed and that he  
17 shouldn't be having those proceedings.

18 THE COURT: Let me ask you this. If the  
19 determination made by the state court judge was just that this  
20 was a case on an action on a note and that motion for summary  
21 judgment in lieu of the complaint was appropriate, has there  
22 really been anything done in state court to liquidate that  
23 claim? I'm asking counsel for Sovereign this question.

24 MR. SCHWARTZ: I'm sorry. I didn't understand the  
25 question.

1           THE COURT: The theory on which I would liquidate --  
2   that I would lift the stay would be that the state court has  
3   already done work on this case to determine the amount of your  
4   claim and if that is not the case then why -- then taking the  
5   other side of the argument, why would I lift the stay. If all  
6   the state court judge decided was that yes, in fact, this is  
7   an instrument for the payment of money only and therefore a  
8   motion -- therefore summary judgment in lieu of a complaint  
9   can be granted and he did -- took no steps to determine the  
10   amount of the claim how is -- how is it -- how is he ahead of  
11   where I would be?

12           MR. SCHWARTZ: Your Honor, my understanding is that  
13   he did receive substantial information in connection with the  
14   summary judgment proceeding about the amount of Sovereign's  
15   claim and the debtor asserted various counterclaims in  
16   connection with that and made the same argument that Mr.  
17   Marotta is making to you now and the court fully determined  
18   those issues. So the only thing that's left is for the  
19   liquidation of the amount. That's my understanding of the  
20   state court proceeding. So he wouldn't -- Your Honor wouldn't  
21   have to be deciding the issue from scratch. I believe that  
22   Justice Tingling decided the issue which he -- essentially  
23   he's on the one yard line and all we're asking Your Honor to  
24   do is to allow him to cross the finish line.

25           MR. MAROTTA: I'd also point out --

1 THE COURT: Just a minute, please.

2 [Pause in proceedings.]

3 THE COURT: I see there is -- it says the allegations  
4 of the defendants concerning payments are unsupported by the  
5 submitted instruments in support or opposition to the motion.  
6 So I guess the question of whether -- the question of the  
7 payments on -- whether payments were made on the notes was  
8 raised before the state court judge.

9 MR. SCHWARTZ: Yes, Your Honor.

10 MR. MAROTTA: Payments on the notes?

11 THE COURT: It says -- Justice Tingling's opinion  
12 says that allegations of defendants, that would be your  
13 client, concerning payments are unsupported by the submitted  
14 instruments in support or opposition to the motion.

15 MR. MAROTTA: He's talking about the fact that we had  
16 paid September and they filed the action anyway. Their action  
17 was filed in September and we had said that when they filed  
18 the action they had already cashed our checks and maybe we  
19 didn't attach the checks but I want to point this out. All of  
20 that was submitted and argued in December of '08. So all --  
21 whatever affidavits he had certainly didn't include any of the  
22 payments that went through February 27, 2009.

23 And I would just say, Your Honor, if you're inclined  
24 to send this back to state court I do think it's a burden and  
25 an expense on the DIP. I think it will impact the DIP's

1 ability to keep pace in these proceedings and if you're  
2 inclined to do so then we would ask that we would also have  
3 leave to file an appeal and make a motion to reargue in the  
4 state court because we don't believe that the judge looked at  
5 all the issues. That motion that was submitted in January or  
6 December of '08 was not -- we had no decision on it and then  
7 it didn't come to light again until August or September when  
8 Sovereign's counsel began sending letters to the court and  
9 asking for status and whether an order would be issued any  
10 time soon.

11 So we would want the ability that the stay would be  
12 lifted. Sovereign would also want the ability to go ahead and  
13 make that appeal and file that motion. We argue -- we think  
14 that the judge would consider the motion to reargue.

15 MR. SCHWARTZ: Your Honor, after the last 45 minutes  
16 of arguing now we get to the debtor's real issue. The debtor  
17 disagrees with that decision and wants to appeal it.

18 THE COURT: But the -- Justice Tingling -- there's no  
19 number in this opinion whatsoever.

20 MR. SCHWARTZ: Absolutely, Your Honor.

21 THE COURT: There's no finding made as to the  
22 amount -- as to amount. So you're starting from scratch on  
23 that --

24 MR. SCHWARTZ: I don't believe so, Your Honor,  
25 because my --

1 THE COURT: You may have given him other papers on  
2 this but he's made no finding that he would be -- it would be  
3 a starting point.

4 MR. SCHWARTZ: Your Honor, my understanding is that  
5 there was various pleadings, declarations, affidavits, et  
6 cetera that were submitted that contained figures. He fully  
7 understood those figures better --

8 THE COURT: That was months ago. That was in  
9 November. You think he remembers that?

10 MR. SCHWARTZ: Well --

11 THE COURT: You'll have to start over again.

12 MR. SCHWARTZ: Your Honor, one of the factors in  
13 Sonex is not that a lot of time has gone by and the state  
14 court might have forgotten things. The factors of Sonex are  
15 met here and that court has --

16 THE COURT: Justice Tingling is going to have to  
17 start -- are you going to say to him you're going I guess -- I  
18 lift the stay, what are you going to do? What's the first  
19 thing you'll do? You will settle an order, won't you, Justice  
20 Tingling, with -- on one's notice to them with an amount and  
21 you'll have to back it up with calculations; correct? You'll  
22 submit a statement of -- where it shows the calculation of the  
23 amount of the claim, am I correct, along with the proposed  
24 order? And then they'll submit their counter order and it  
25 will be the same as if you were -- have you filed a proof of

1 claim in this case?

2 MR. SCHWARTZ: No, Your Honor. The deadline hasn't  
3 come yet so we haven't done it.

4 THE COURT: Why wouldn't you better off just filing a  
5 proof of claim in this case and handling it here? What is the  
6 advantage of going back to Justice Tingling?

7 MR. SCHWARTZ: Because, Your Honor, again --

8 THE COURT: He has no -- he's not going to be able to  
9 do it any faster than I would.

10 MR. SCHWARTZ: Your Honor, I would --

11 MR. MAROTTA: I would also submit --

12 THE COURT: I'm not asking you for your comments  
13 right now.

14 MR. MAROTTA: Yes, Your Honor.

15 MR. SCHWARTZ: I believe that he would, Your Honor.  
16 Again, I think that there --

17 THE COURT: Why is that?

18 MR. SCHWARTZ: Because my understanding is that he  
19 was submitted with again affidavits, declarations, and they  
20 contain figures. He understood those figures. Perhaps he  
21 might have to refresh his memory by looking back at them. At  
22 the end of the day we will submit whatever documents are  
23 required in order to liquidate our claim. I'm sure the debtor  
24 will then say Sovereign is wrong and here's what the figures  
25 should be and he'll do whatever he does, but he's already --

1 again, he's gotten to the one yard line and he's --

2 THE COURT: Then we want -- then we're going to have  
3 appellate practice in state court and that's going to hold up  
4 this case forever.

5 MR. SCHWARTZ: Your Honor, I don't know whether we're  
6 going to have appellate practice.

7 THE COURT: I don't think there's anything that's  
8 been determined so far that would collateral estoppel effect  
9 here. I'm not sure whether the fact that he signed that  
10 judgment would have collateral estoppel effect but if it  
11 doesn't then I'm not sure what the advantage is of going back  
12 to Justice Tingling. This isn't a case where there was a  
13 trial. This is a case where there's a motion for summary  
14 judgment in lieu of a complaint. The only issue on that case  
15 is whether the instrument for payment of money only and  
16 whether there are I guess compulsory counterclaims. Is that  
17 the other issue on that?

18 MR. SCHWARTZ: Yes, I believe that that's correct,  
19 Your Honor, and I believe that Sovereign submitted proof of  
20 the amount that was owed. It submitted proof that it was owed  
21 these amounts on accountant's notes. The debtor argued that  
22 that amount should be reduced. The debtor had supposed  
23 counterclaims and the debtor had supposed defenses. He read  
24 all the papers. He decided that summary judgment and he  
25 decided it fully in favor of Sovereign.

1 THE COURT: Right. But he didn't fix an amount.

2 MR. SCHWARTZ: He didn't fix an amount. Instead he  
3 directed that the parties submit an order and he would then  
4 fix the amount pursuant to an order.

5 THE COURT: But he hasn't done that yet.

6 MR. SCHWARTZ: Well, again, Your Honor, he signed  
7 something. It might have been a day after the petition was  
8 filed. The debtor filed an order to prevent him from doing  
9 that. All we're asking the court to do is allow him to do  
10 what he already was at the one yard line ready to do. Your  
11 Honor knows nothing about this other than counsel's  
12 unsubstantiated statements here today. Justice Tingling knows  
13 a lot more about this because he handled this for a year-and-  
14 a-half or so.

15 THE COURT: So we're going to go -- we're going to  
16 send this back to state court and we're going to just wait  
17 until it wins its way through that process?

18 MR. SCHWARTZ: I don't know how long the process is  
19 going to take particularly because he was able --

20 THE COURT: I don't think -- as I'm understanding  
21 this now from Mr. Marotta, I don't think that this is a  
22 situation where you're just going to take that judgment and  
23 docket it and that's the amount. I think you're going to have  
24 to go back and prove up the amount of your claim.

25 MR. SCHWARTZ: I don't know if that's the procedure.



1           THE COURT: And if that's the case then I don't know  
2 why it should be done there instead of here.

3           MR. SCHWARTZ: Your Honor --

4           THE COURT: Because -- and with all of the attended  
5 delay and I lose control over the process and then we're  
6 talking about a substantial period of time of delay.

7           MR. SCHWARTZ: Your Honor, I don't know that that's  
8 the process because I'm unfamiliar with the practice in New  
9 York State court.

10          THE COURT: Well, Mr. Marotta says that he is and --

11          MR. SCHWARTZ: Perhaps what I can do is --

12          THE COURT: -- in the absence of anyone with better  
13 knowledge I guess I would take his word for it.

14          MR. SCHWARTZ: Well, perhaps what I would suggest and  
15 I would suggest to the court would be --

16          THE COURT: Do you want me to carry this motion?

17          MR. SCHWARTZ: -- to carry this motion until June 1<sup>st</sup>  
18 and I will check with the litigator who handled this in New  
19 York State court who certainly knows that issue much better  
20 than I and I can address the court with respect to that issue  
21 on June 1<sup>st</sup>.

22          THE COURT: Okay then. I'm not sure that I'm going  
23 to hear this on June 1<sup>st</sup>. I think we're going to turn to  
24 the -- I will tell you right now that this will -- I'm going  
25 to turn my attention first to the motion to convert and if we

1 don't -- we'll take that to a conclusion. If we don't have --  
2 if we have time we can address this. If we don't have time we  
3 won't get to it.

4 MR. SCHWARTZ: I understand that, Your Honor. I  
5 assume, Your Honor, that the joint pretrial order that Your  
6 Honor had indicated earlier lists things like witnesses and  
7 documents and things like that.

8 THE COURT: Yes. Okay. Anything else?

9 MR. SCHWARTZ: Thank you, Your Honor. That's it from  
10 Sovereign's side.

11 THE COURT: Okay. Anything else from the debtor?

12 MR. GABOR: No, Your Honor. Thank you very much.

13 MR. MAROTTA: I'll just note, Your Honor, that June  
14 23<sup>rd</sup> is a date scheduled for hearing on the approval of the  
15 disclosure statement.

16 THE COURT: Well, you might as well -- you might as  
17 well take that off the calendar because this plan is  
18 unconfirmable as written. So I think that that date is one  
19 that you're going to have to change.

20 MR. MAROTTA: Well, sometimes arrears can be paid  
21 over time.

22 THE COURT: No they can't. Not if you want to treat  
23 the creditor as unimpaired.

24 MR. MAROTTA: We'll pay interest on the arrears.

25 THE COURT: No, that's -- Mr. Marotta, we need to get

1 clear on a couple of points here. Let's get to the section  
2 that defines what is -- impairment of claims or interest. A  
3 class is impaired unless you cure the default, reinstate the  
4 maturity of the claim and compensate the holder of the claim  
5 for -- or interest for damages incurred as a result of any  
6 reasonable reliance on the contractual provision. So that  
7 means that you have to cure the default, period, end of story.  
8 Not over time. Not with an interest factor. You have to cure  
9 the default and reinstate the maturity of the claim and then  
10 in addition to that if there are some other damages that have  
11 been incurred by reason of the default those have to be paid  
12 as well. Under -- you cannot treat a party as unimpaired  
13 by -- and pay out -- and pay the cure of the default over a  
14 period of time. It's to be paid on or before the effective  
15 date of the plan.

16 MR. MAROTTA: And as Mr. Gabor suggested, at this  
17 point in time in the midst of motions pending before this  
18 court the debtor simply filed a proposed plan.

19 THE COURT: Right, with --

20 MR. MAROTTA: Which the debtor will have --

21 THE COURT: With a complete sham, phoney plan.

22 MR. MAROTTA: I'm sorry to hear Your Honor say that  
23 because it was a lot of work that went into preparing that  
24 plan.

25 THE COURT: That's -- it looked like it was form that

1 was --

2 MR. MAROTTA: And not having the proof of claim from  
3 Sovereign that we had to make some assumptions and being told  
4 that there was a mortgage that there was not. We were also  
5 forced to make other assumptions.

6 THE COURT: But there was no -- Mr. Marotta, there  
7 was no scenario whether they were secured or unsecured that  
8 you were treating their claim as unimpaired and yet that's  
9 what you put in the plan and this is the only creditor at this  
10 point that you have a fight with. So there was --

11 MR. MAROTTA: If we listed them as impaired even if  
12 they objected as long as an impaired class voted in favor of  
13 the plan we might still overcome the objection.

14 THE COURT: But you didn't treat them as -- you did  
15 not -- this plan as it is drafted is unconfirmable. It's  
16 unconfirmable. It does not treat -- it does not correctly  
17 describe the treatment of their claim.

18 MR. MAROTTA: And Your Honor may decide at some  
19 point in time that we need to determine what the extent of  
20 their security interest is before the plan could be confirmed.

21 THE COURT: Well, whether they are secured or --

22 MR. MAROTTA: Until they file a proof of claim we  
23 don't really know what their claim is.

24 THE COURT: Whatever their claim is you're not  
25 treating them as unimpaired, not the way you describe -- not

1 the way you're describing the treatment in the disclosure  
2 statement that you're going to give them. The only -- unless  
3 you are planning on raising the money to cure the default and  
4 to reinstate the mortgage or the note in its -- on its  
5 original terms you're not treating them as unimpaired.

6 MR. MAROTTA: The notes has already been accelerated.

7 THE COURT: It doesn't matter. That's the thing  
8 about -- you can treat them as unimpaired. I believe you can  
9 reinstate the original maturity date of the note even if it's  
10 been accelerated but even so you didn't -- there was only one  
11 reason to file this plan because of the -- because of this  
12 agreement or the dispute that you have with Sovereign.

13 MR. MAROTTA: Yes.

14 THE COURT: So the only really important thing in  
15 that plan was how you were treating Sovereign's claim and it  
16 was a complete -- it was a nonsense, a nonsense plan at least  
17 as it related to that because you said you were treating them  
18 as unimpaired and you patently are not.

19 MR. MAROTTA: I don't see how that's fair. If we  
20 don't know they have a recorded mortgage, if we don't know the  
21 extent of their claim, how can we have treated them fully and  
22 fairly yet -- I mean we've proposed something. We spoke with  
23 counsel. They refused to meet with us. We speak with counsel  
24 but the parties will not sit down.

25 THE COURT: But what you call -- what you propose --

1 what your propose was to put them in a category where they're  
2 not entitled to vote because they're unimpaired and clearly  
3 what you are proposing to do with them no matter what their  
4 claim is was not to treat them as unimpaired. Whether secured  
5 or unsecured clearly they're not unimpaired as of the way that  
6 you're treating them.

7 MR. MAROTTA: As Mr. Gabor stated, if Your Honor  
8 finds that they are impaired then --

9 THE COURT: They obviously are impaired. They're  
10 obviously impaired.

11 MR. MAROTTA: Well, then we could amend --

12 THE COURT: The problem I have, Mr. Marotta, with the  
13 way that you operate is that you seem to assume that you can  
14 make arguments that really have no basis in the fact of the  
15 case. So I think that it would work a lot better, it would  
16 work a lot better in this case and in other cases if you put  
17 yourself in the mind set of we're going to go by the code and  
18 the rules and the facts of the case and don't ask me to assume  
19 something which is patently ridiculous.

20 MR. MAROTTA: I did not ask Your Honor to assume  
21 anything. I mean I didn't make any representations about the  
22 mortgage. Last time we were here Sovereign made the  
23 representation that a judgment was entered they said and I  
24 said there wasn't.

25 THE COURT: Mr. Marotta, I'm talking about you right

1 now. I'm not talking about them. Okay? I'm talking about the  
2 way you are conducting yourself in this hearing -- in this  
3 proceeding and I think that this whole case would go a lot  
4 more smoothly if you would -- when I tell you that this -- or  
5 I read to you the provision that describes what being impaired  
6 is if you would listen to that and respond to me in a rational  
7 way instead of making a ridiculous assertion I think that  
8 that -- I think that this would go a lot more smoothly if you  
9 would think about it in those terms.

10 MR. MAROTTA: Okay. I didn't mean to offend the  
11 court. I would say that I did look at some of these cases on  
12 reinstating a loan and I found them to be complex. I am not  
13 prepared today, Your Honor, to address that and I apologize  
14 that I'm not, but I didn't understand that you would be  
15 debating whether Sovereign was unimpaired or impaired.

16 THE COURT: The point is you filed a plan in order to  
17 show that you could confirm a plan but you filed a plan that  
18 is -- was unconfirmable on its face as it relates to the  
19 treatment of Sovereign's claim because it proposed to treat  
20 them as unimpaired when they patently are impaired. So we  
21 could argue about whether reinstating it in a month or two  
22 months or three months was within the time frame effect -- if  
23 you propose -- tell me an effective date, how long can you  
24 postpone it we could talk about that but that's not what you  
25 proposed in your plan. What you proposed is not within the

1 framework of any discussion that would relate to whether this  
2 claim is impaired or not impaired. Obviously it's impaired.  
3 So I don't know whether you're not -- you don't do -- I don't  
4 know what -- I don't know what the issue is here that it would  
5 work --

6           As I say, in the interest of this case going forward  
7 as smoothly as it can, I would ask you to -- don't tell me  
8 it's day when it's night. I would ask you to make an effort  
9 to screen the assertions that you make and make sure that they  
10 are within the framework of what -- at least something that  
11 could be substantively argued about. Okay? I apologize if  
12 this is -- if you have been offended and I hope that we can  
13 work better going forward.

14           MR. MAROTTA: I may be a little exhausted from  
15 litigating this with Sovereign but I'd just like to say that  
16 if I did find a case that said a reasonable period of time or  
17 the like could I submit it to Your Honor? I don't --

18           THE COURT: I am not -- it is -- a reasonable period  
19 of time is not over the life of the plan. It might be thirty  
20 days but it's not within -- it's not what you proposed. In  
21 fact, you didn't even propose to cure arrears. What you say  
22 about the treatment of Sovereign's claim makes no mention of  
23 treating arrears. What you're proposing to do under this plan  
24 has no -- that doesn't address arrears in any way, shape or  
25 form. It talks about paying out the claim with in an interest



1 factor over time. That's not unimpaired.

2 MR. MAROTTA: Paying interest on the arrears and then  
3 paying it off early as opposed to the maturity date.

4 THE COURT: That's not unimpaired. That is a change  
5 in the contractual rights of the creditor. It might be  
6 permissible under another provision of the bankruptcy code but  
7 it's not unimpaired and therefore they are entitled to vote.

8 MR. MAROTTA: I'm not arguing that day is night any  
9 more.

10 THE COURT: Well, I think that you should stop doing  
11 that.

12 MR. MAROTTA: I was just explaining what we proposed.  
13 That's all.

14 THE COURT: Okay. Well, I think we've exhausted this  
15 subject. So I'll see you on June 1<sup>st</sup>.

16 MR. MAROTTA: Thank you.

17 MR. SCHWARTZ: Thank you, Your Honor.

18 THE CLERK: All rise.

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1 I certify that the foregoing is a court transcript from  
2 an electronic sound recording of the proceedings in the above-  
3 entitled matter.

4  
5 \_\_\_\_\_  
6 Shari Riemer

7 Dated: May 26, 2010  
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